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92-1096

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THE SUPREME COURT OF THE UNITED STATES OF AMERICA
October Term, 1992
NO:

SIEU MEI TU, JOSEPH Z. TU)
)
PLAINTIFFS, APPELLANTS,)
APPLICANTS)
VS.)
)
UNITED STATES COURT OF APPEALS)
NINTH CIRCUIT)
)
RESPONDENT)

SOUTHERN PACIFIC TRANSPORTATION)
COMPANY; ATCHISON, TOPEKA, SANTA FE)
RAILROAD COMPANY; PACIFIC FRUIT)
EXPRESS COMPANY; T. ELLEN; E.E.CLARK;)
D. W. FEND; T. R. ASHTON; DOE DEFEN-)
DANTS ONE TO TWO THOUSAND; WHITE)
COMPANY; BLACK CORPORATION; BROTHER-)
HOOD OF RAILWAY AIRLINE AND STEAMSHIP)
CLERKS; R. B. BRACKBILL;J. M. BALOVICH;)
SANTA FE SOUTHERN PACIFIC CORP)
REAL PARTIES IN INTEREST)

APPLICATION FOR WRIT OF CERTIORARI TO REVIEW MEMORANDUM OF DECISION OF UNITED STATES COURT OF APPEAL, NINTH CIRCUIT, FILED JUNE 1, 1992
(RULE 10 (1) (a) (c))

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SIEU MEI TU and JOSEPH Z. TU

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TO THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES OF AMERICA:

PLAINTIFFS-APPELLANTS-APPLICANTS SIEU MEI TU and JOSEPH Z. TU HEREWITH petition pursuant to Title 28, United States Code, section 1254(1); Rule 10 (1) (a) and (c) Rules of the Supreme Court of the United States4Hs FOR WRIT OF CERTIORARI TO REVIEW MEMORANDUM OF DECISION OF UNITED STATES COURT OF APPEAL, NINTH CIRCUIT, FILED JUNE 1, 1992

(a) QUESTIONS PRESENTED FOR REVIEW

1. Does the Railway Labor Act prevent a Union Employee of a wholly owned subsidiary of a Railroad, from bringing a civil action under state and federal anti discrimination statutes for tortious workplace employment discrimination by reason of the workers origin of birth, sex, and or age.

Does enforcement of a state law claim of racial, sexual, and or age discrimination constitute such interference with federal policy concerning railroad collective bargaining agreements, so as to prohibit a person who has been discriminated against from seeking relief from any forum other than RLA arbitration procedure. Is discrimination

by an employer a minor dispute?

2. Has a gross miscarriage of justice occurred here against which the Supreme Court should act?

3. When an employer refuses to arbitrate with an individual employee concerning the employer's breach of the collective bargaining agreement, and the employer and the employee's labor union advise the employee that the union is arbitrating her grievances but the union fails to arbitrate that employees particular grievances, can the employee bring a civil action for the grievances under the principles of Vaca v. Sipes, 386 U.S. 171.

(b) PARTIES TO PROCEEDING

All the parties to the proceeding are listed in the caption of this pleading.

(c) TABLE OF CONTENTS AND TABLE OF AUTHORITIES

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(d) REFERENCE TO OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS DELIVERED IN THE CASE BY OTHER COURTS OR ADMINISTRATIVE AGENCIES

There have been two administrative proceedings involving the respondents and the failed merger, the initial determination by the ICC is reported in Santa Fe Southern Pacific Corp. recon den., 3 I.C.C. 2d 926 (1987) (SFSP) and Rio Grande Industries , et al--Control--SPT Co., et al, 4 I.C.C. 2d 834 (1988) (Rio Grande), aff'd sub nom. Kansas City Indus., Inc. v. United States, 902 F2d 423 (5th Cir. 1990). See also Railway Labor Execu-

tives Assn v. ICC (9th Cir. 1991) 958 F2d 252

The second was an arbitration proceeding under the RLA for which there is no known report, but a copy of the decision in that matter is contained in the Appendix hereto.

(e) GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS SOUGHT TO BE INVOKED

(i) The date of entry of the judgment or decree sought to be reviewed:

Ninth Circuit Court of Appeal Memorandum Decision filed June 1, 1992 re the following orders of the United States District Court for the Northern District of California:

Order denying motion to remand (October 13, 1987)
Order granting Defendants' motion to dismiss(April 8, 1988)
Order re Defendant's motions to dismiss and for summary judgment (June 29, 1988 and June 30, 1988)
Order granting Defendants' motion for summary judgment (Feb. 8, 1989)
Order granting defendants' motion for summary judgment and to dismiss (August 14, 1989)
Judgment August 21, 1989

(ii) The date of order respecting rehearing:

September 22, 1992

(iv) The statutory provision believed to confer on this Court jurisdiction to review the judgment or decree by writ of certiorari:

Jurisdiction of this court is sought to be invoked under The United States Constitution, Article III, Sections 1 & 2, Amendment VII, 28 U.S.C. 1254 (1), Rule 10 (1)(a) and (c), Rules of the Supreme Court of the United States in that there are special and important reasons therefore including the following:

(i) The Ninth Circuit Court of Appeals in this matter **has rendered a decision in conflict with the decision of another United States Court of Appeal**, to wit the Tenth Circuit Court of Appeals in the case of McAlester v. United Air Lines, Inc. (10th Cir. 1988) 851 F2d 1249. The conflict substantially affects a rule of national application for which there is a need for national uniformity. McAlester supra, decided that the RLA does not repeal or preempt employment discrimination claims sounding in tort based on

recognition of social right of equality of opportunity of persons regardless of race, while the 9th Circuit in the instant matter, declared that the plaintiffs tortious termination-discrimination claims were subject to mandatory arbitration under the RLA, (Memorandum page 22); were "minor disputes"; and plaintiffs exclusive remedy is under the RLA. (Memorandum page 7). See also Pender v. National RR Passenger Corp. (DDC, 1985) 625 F. Supp. 252 and Bremer v. St. Louis Southwestern R. Co. (DC Mo 1969) 310 F. Supp 1333.

(ii) **The Ninth Circuit's memorandum of decision has decided a federal question in a way in conflict with deep rooted interests of the State of California, or sanctioned such a departure by the District Court of the Northern District of California, as to call for an exercise of this court's power of supervision.**

California has a deep rooted interest in

having all its citizens free from discrimination because of their race, age, and or sex. In this case, all three prejudices manifested themselves, and these interests of the State to have the work place free of discrimination, were ignored by the Ninth Circuit.

(iii) **A gross miscarriage of justice has occurred in this matter**, in that the employer's attorneys in the civil action petitioned for remand to the federal court from the state court on the basis that Sieu Mei Tu's employer was a "carrier" with exclusive jurisdiction in the federal courts and argued successfully that Plaintiff's claim of conspiracy to subvert her civil rights to be free of discrimination by reason of sex, age, and or national origin and to deny her, her common law contract rights could only be enforced before the Interstate Commerce Commission, and then argue before the Interstate Commerce Commission that the

ICC has no jurisdiction over her claims, because Sieu Mei's employer is not a carrier, thus denying a female person who came to this country, became a citizen, and worked for the same employer over twenty two years, being told she would always have a job until she retired, and if no work was available to her, she would receive her salary to full retirement; paying her union dues and believing that the union would protect her full rights; less than three years before becoming eligible for full retirement benefits, being terminated by her employer without any termination benefits and her union failing to enforce her rights; and being denied a forum in which to enforce her rights on her own. Further the court of Appeal in a miscarriage of justice which attacks the integrity of the judicial process, refused to consider all of the arguments applicable to petitioners' appeal. (Memorandum, page 11)

Petitioner was unconstitutionally denied her right to trial by jury and discovery. The full power of giant's of industry, the railroads and the railroad union have joined here to attempt to deny a single individual of the fruits of the American dream.

(F)THE CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, RULES, ORDINANCES, AND REGULATIONS INVOLVED IN THIS CASE

The constitutional provisions, treaties, statutes, ordinances and regulations involved in this case are:

United States Constitution
Article III Sections 1 and 2
Amendment VII

28 USC 1254 (1)

28 USC 1291

28 USC▸ 1445 (a)

42 USC 1983

45 USC 51

49 USC 11347

Rules of the Supreme Court of the United States
Rule 10 (1) (a) and (c)
Federal Rules of Civil Procedure
Rule 4 (j)

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(g) STATEMENT OF THE CASE

(A) NATURE OF CASE

Plaintiffs filed an action in The Superior Court of the City and County of San Francisco (DEN 1, EX 5) on causes of action for tortious wrongful termination of employment, breach of private (non collective bargaining agreement) contract of employment, breach of covenant of good faith and fair dealing, intentional and negligent infliction of emotional distress, employment discrimination under California State Statutes (California Government Code 12900 et seq. and California Public Utilities Code 453 (a)) , Conspiracy, and Loss of Consortium.

Defendant PFE appeared by Acknowledgment of Receipt of Summons (EX 17) and by answer (DEN 3). Defendant Southern Pacific Transportation appeared

by answer on March 23, 1987 (DEN 8 Ex 18), Defendants Atchison, Topeka and Santa Fe and Santa Fe Southern Pacific Corporation appeared by answer on December 24, 1987 (DEN 25 EX 260).

Defendants filed a Petition For Removal to The United States District Court for the Northern District of California (DEN 1), Plaintiffs objected to the jurisdiction of the Federal Court (DEN 9, EX 24), and moved to remand to the state court (DEN 16. Ex 26). Defendants admitted in their Memorandum in Opposition (DEN 17 page 3, lines 21 & 22) that "All causes of action are pled under state law." By order filed October 9, 1987 DEN 24, Ex 253) the plaintiffs' motion was denied. On February 29, Defendants moved to dismiss and for summary judgment (DEN 28). By order filed April 6, 1988, (DEN 36 EX 284) the court dismissed Plaintiffs first and second causes of action, (wrongful termination of employment, breach of agreement of employment); did not rule on Plaintiffs third cause of action for intentional and negligent infliction of emotional distress, breach of covenant of good faith and fair dealing;

refused to exercise pendent jurisdiction over Plaintiffs fourth and fifth causes of action (discrimination, conspiracy). On April 29, 1988, Plaintiffs filed their First Amended Complaint (DEN 38). Defendants moved to dismiss and for summary judgment (DEN 39 & 42). By order dated June 30, 1988 (DEN 51, EX 304), the court vacated its April 6, 1988 order as to pendant jurisdiction, determined to exercise its pendant jurisdiction over the fourth and sixth causes of action, dismissed with prejudice the second (breach of covenant of good faith and fair dealing); third (intentional infliction of emotional distress); fifth (conspiracy); and seventh (negligent infliction of emotional distress) causes of action, dismissed the railroads from the eighth cause of action (breach of collective bargaining agreement and breach of duty of fair representation); and dismissed defendants Santa Fe and Railway from all causes of action. By order filed February 6, 1989 (DEN 98 EX 890) the trial court granted summary judgment against Plaintiffs on their discrimination claim; on their claim for loss of consortium;

and on their claim for breach of duty of fair representation. On Motion for Reconsideration (DEN 104) by order filed May 3, 1989, (DEN 114 EX 915), the District Court denied Plaintiffs motion as to Southern Pacific, but granted it as to the Union Defendants, and directed Plaintiffs to file an amended complaint by June 2, 1989. Plaintiffs filed their Second Amended Complaint June 2, 1989 (DEN 115 EX 919). Defendants Union moved to strike various causes of action and for Summary Judgment (DEN 117 & 118). None of the other defendants responded in any way to the Second Amended Complaint. By order filed August 14, 1989, the court granted Defendants Union's motion for summary judgment as to plaintiffs claim for breach duty of fair representation, and dismissed with prejudice plaintiffs' second amended complaint. (DEN 130 EX 1143). Judgement was thereon entered August 21, 1989 (DEN 131 EX 1142). Plaintiffs filed their Notice of Appeal on September 8, 1989 (DEN 133 EX 1150).

On June 1, 1992, the Ninth Circuit Court of Appeal denied petitioners' appeal. On September

22, 1992, the Ninth Circuit issued an order that Petitioners petition for rehearing was without merit.

(B) STATEMENT OF FACTS

Joseph Z. Tu (JZT) and Sieu Mei Tu (SMT) are husband and wife. (EX 41). Sieu Mei Tu is a female, born in China on September 4, 1926. (DEN 1 EX 6) (EX 40). On May 15, 1962, SMT commenced working for Defendant Railroads at the San Francisco offices of the Southern Pacific as a key punch operator (DEN 90 EX 733) (EX 40) (EX 47). On or about December 18, 1978, her private contract of employment was reduced to a writing of one page (DEN 1 EX 15). That contract provided among other things, that if no job were available for her, she would continue to be paid her salary and benefits to age 65. The provision as it was expressed in the private contract read as follows:

> "Her position with this company is not only permanent in nature but she is, under our contract with the Brotherhood of Railway, Airline & Steamship Clerks, "fully protected" so that in the unlikely event we were not to have a job for her, she would continue to be paid under that contract until she reaches age 65 and can retire

> under the provisions of Railroad Retirement Act and receive the appropriate pension therefrom.
>
> Mrs. Tu holds the position of Payroll Clerk and her current salary is over $1,300 per month, and is due for an increase therein of some ten percent more. She is, and has always been, a valued employee and even if her present position were to be eliminated, we would find some other position for her to hold as we would not want to lose her services." (EX 15).

The contract with the Brotherhood of Railway, Airline & Steamship Clerks (BRAC) referred to therein, provided as follows:

> "Section 11- In the event of a decline in a carrier's business in excess of 5% in the average percentage of both gross operating revenue and net revenue ton miles in any 30-day period compared with the average of the same period for the years 1968 and 1969, a reduction in permanent positions and employes may be made at any time during the said 30-day period beyond the operation of attrition as referred to in Section 12 of this Article to extent of one percent for each one [percent the said decline exceeds 5%...
> **THE PROVISIONS OF THIS SECTION WILL NOT APPLY TO PACIFIC LINES EMPLOYES IN THE SAN FRANCISCO GENERAL OFFICES WITH SENIORITY DATE OF MARCH 16, 1963 OR EARLIER.... " (emphasis added) (EX 971).**

SMT's seniority date was **MAY 15, 1962** (DEN 90 EX 867) (DEN 225) (EX 648, 672 & 738). Under the applicable collective bargaining agreement SMT was attributed to the San Francisco general offices (DEN 38 and 115 Ex B section 5, DEN 90 Ex A pages 89-95, 740, and 815 Union supplemental extract of record.) Commencing in the year 1982, there was a concerted effort by the management of Defendant Railways to curtail the business of refrigerated car transportation (DEN 90 EX 737-738) to discourage customer inquiries and to not inventory sufficient freezer cars to service the customers. (DEN 90 EX 737-738). This was coincidental with Mr. Tom Ellen becoming the chief officer of PFE. (DEN 90 Ex 738). At the same time there was a shift in the treatment of Plaintiff Sieu Mei Tu, in that managerial people told her crude sexual jokes, and made fun of her when she didn't understand. When desk assignments were made, although she was one of the most senior workers involved, she would be denied the more favorable desk positions. She was moved into jobs that would cause her to have the greatest friction with management

personnel. Plaintiffs age, race and or sex were resented in relation to her assertive insistence that management personnel properly account for their use of cash funds and expenses, and her refusal to go along with and overlook their conduct.(Ex 159-164). She was advised by her superiors to take jobs at lower pay than she was receiving, and when she did so, she was required to perform the same work as she had performed at the higher paying position (EX 72). There was exhibited by management a perceived attitude that persons who were not native born were inferior. Any mistake she made was attributed to her national origin. Her accent, language and cultural differences were the point of ridicule by the company. (EX 154-159, 165-167 & 309). Sieu Mei Tu, an accounting clerk, was assigned janitorial jobs and house cleaning jobs when persons less senior were not required to perform these duties. Plaintiff was assigned to work in an unsafe location (EX 74). When her supervisor gave her a 10 on her performance review, the controller required the supervisor to drop her level to an 8.

Management created an atmosphere of fear that if Plaintiff exercised her rights to seek damages against the company for personal injuries received on the job, she would fall from grace and her job would be in jeopardy. (EX 309) There was a concerted effort to attempt to force her to leave "voluntarily". (DEN 90 EX 733).

In December, 1983, the Santa Fe Southern Pacific Corporation acquired the right to all the stock of Southern Pacific Transportation Company, subject to ICC approval of the merger (EX 1124) and formed the intent to merge the Santa Fe and Southern Pacific railroads and sell and spin off the valuable assets of Southern Pacific Transportation Company and Pacific Fruit Express. (DEN 38 page 12, DEN 45, and DEN 115 page 12 and Exhibit F thereto) (EX 1124). When the ICC refused to authorize the merger (October 10, 1986), the Railroad defendants were ordered by the ICC to attempted to sell off the business of the SP (EX 1124). The Union that was suppose to represent Plaintiff in protection of her employment rights attempted to buy the SP on its own and sought to

become the bargaining agent for the consolidated railroads. (DEN 38-page 15) (EX 189-193 & 884). In 1985 the Railroad defendants closed the offices of PFE, and moved its work back to the SP headquarters building. (DEN 115 page 12). Sieu Mei Tu was moved into at least four different positions. Except for one job that she bid for and was promoted to in March, 1984, as General Clerk, all subsequent jobs were at lesser pay rates(EX 91), and no other person in her position experienced this type of treatment. Beginning in March, 1985, her job as General Clerk was abolished. She was moved to a different job description at a lower rate of pay and moved to a different department downstairs (Car Service Clerk). In two weeks that job was abolished and she was moved to a third job at a still lower rate of pay. Then a bulletin was posted as to the availability of Job 141 (miscellaneous clerk) (Job 141 had previously been described as General Clerk) and Job 150 (bills payable clerk). Since Sieu Mei Tu had performed both of these jobs in the past, and was eligible to select either one, she decided to bid for the

bills payable clerk job.

She told her supervisor she was going to bid for the bills payable clerk job. He asked her not to do so. That job was given to a Caucasian woman approximately 11 years younger than Sieu Mei Tu, who was subsequently transferred to SP, leaving Sieu Mei Tu in the position of bills payable clerk (EX 101-110), which job was abolished (EX 77), and Sieu Mei Tu was terminated (EX 48) without severance pay, without continuance of salary or benefits, without accrual of further retirement rights, and without the benefit of retirement. She was too young to retire but considered by her employer too old to be transferred. By October, 1988, Sieu Mei Tu was the only PFE employee who was not either transferred to SP, severed with substantial benefits and pay, or retired with special circumstances. She was the only one without any golden parachute.(EX 735-738).

Thereafter she interviewed for a open clerks position at SP as a new hiree,. She was told by the interviewer that there would be no recognition

of her seniority or years of service if she were rehired. One of the attorneys for the employer witnessed the interview process. After being put through that interview process no job was offered to her.(DEN 64 and 88). It was clear she was being further discriminated against because she filed this law suit, and had filed a charge of discrimination with the California Fair Housing Office. (EX 735-738).

Since the business of PFE has been transferred to SP, it has shown substantial profitability. Numerous jobs of the categories performed by Sieu Mei Tu have been created and filled with new employees. None of these positions were offered to Sieu Mei Tu.(EX 735-738)

The number of Chinese employed by PFE has never been reflective of the number of Chinese living in the Bay Area and available for employment in jobs performed at PFE.(EX 736) In the process of transferring PFE operations to Southern Pacific Transportation, statistically 1/8th of those on the PFE Seniority District 1 list on October 1, 1985 were of Chinese national origin,

while 7/8ths were Caucasian. 1/2 of those of Chinese national origin were transferred to SP and 1/2 terminated, while 8/13ths of the Caucasian population were transferred to the SP, and 5/13ths "furloughed". 100% of the Caucasian population is now employed at SP or offered employment at SP, while 50% of the Chinese population has neither been transferred nor offered employment at SP. (Fend Declaration Exhibits A-D; Tu Declaration par. 5, 6, 7, 10) 1/3 of those over age 55 were transferred to SP, while 2/3 of those over 55 were furloughed. 7/17ths of the population at PFE covered by the Union contract were females, while 9/17ths were male. 4/7ths of the female population were transferred while 5/8ths of the male population were transferred (DEN 87 EX 526)

Defendants then employed young workers who had not previously worked for Defendants to perform the duties Plaintiff performed prior to her termination (DEN 90 EX 733).

The Defendants claimed they were entitled to discharge Sieu Mei Tu under the collective bargaining provision concerning decline in business

(EX 871). Upon her discharge, Sieu Mei Tu, requested the Union to institute proceedings and render its aid for her defense against this unwarranted treatment by her employer, and notified the employer of her desire to engage in administrative process for resolution of her claims. The employer refused to engage in administrative resolution with Sieu Mei Tu independently and advised her that the Union had filed claim under the collective bargaining contract and her claim was being handled under the Railway Labor Act ("RLA") procedures. The Union's only response was that Mrs. Tu's letter had been sent to a wrong address and to assure her that the Union was "progressing a claim in accordance with the PFE/B.R.A.C. Agreement in behalf of Mrs. Tu and all other B.R.A.C. PFE clerical employes affected by PFE Management decision to close the Brisbane PFE office." (DEN 50 EX 286-290). On at least three occasions, the attorney for Plaintiff telephoned the Union to determine the nature and progress of the claim the Union was supposedly pursuing for Plaintiff Sieu Mei Tu, and the name and location of the attorney

handling the matter. He was finally given the name of an attorney on the East Coast, whom he called. That attorney advised Plaintiffs attorney he knew nothing of a claim on behalf of Sieu Mei Tu, but was acting for the Union in a suit filed against the Railroads and then pending in the United States Court in Utah, but that action only concerned PFE employees who had been transferred to SP and did not involve any issues concerning PFE employees that had been "furloughed". Plaintiff's attorney requested copies of the pleadings filed in that matter, but never received the same. (DEN 89 EX 696) Plaintiff's attorney filed suit in the state court to protect and pursue Plaintiff's California causes of action. After Southern Pacific Transportation appeared, its counsel requested Plaintiffs not to serve the other defendants inorder to facilitate early settlement of this matter. Pursuit of the objective of settlement rather than trial appeared to Plaintiffs to be a worthy objective. Plaintiffs believed reliance on such a representation was good cause for not serving the other defendants. When it

became apparent that there would be no good faith meaningful settlement discussions, Plaintiffs served the other defendants. (DEN 45) Until the lower court ruled that the matter was properly removed to the Federal Court Plaintiff had good cause to believe that the matter would be remanded to the State Court, and thus good cause to believe that Rule 4(j) would be inapplicable to this action. (DEN 89 Ex 694-696).

In proceedings before the ICC the Union presented no evidence of the adverse effect of the merger on employees of the Railroad (EX 1124 & 1135-1140). On January 25, 1989, the ICC refused to include determination of the issue of adverse effect of the merger on employees and provided that employees that had such a claim should pursue those claims in a civil action. (Ex 1124-1128). The ICC was subsequently instructed by the 9th Circuit that the ICC had exclusive jurisdiction which precluded aggrieved employees from filing claims directly with the district court under section 11705. Kraus v. Santa Fe Southern Pacific Corp, 878 F2d 1193 (9th Cir. 1989) 27,28

The Union has never claimed that it made a judgmental determination not to process all of plaintiff's claims administratively under the RLA.

The defendants blocked the taking of discovery by Plaintiff affecting her ability to meet the motions for summary judgment and or dismissal. (EX 694). Plaintiff was denied the right to seek further discovery by the District Court.

(i) BASIS CLAIMED BY DEFENDANTS FOR FEDERAL JURISDICTION TO REMAND FROM THE SUPERIOR COURT OF THE STATE OF CALIFORNIA TO THE UNITED STATES DISTRICT COURT OF NORTHERN CALIFORNIA

Defendants Petition for Removal states:

> "Petitioner PFE is...a "carrier" within the meaning of the Railway Labor Act, 45 USC § 151 et seq. This suit is a civil suit of which this court has original jurisdiction under 28 USC §§1331 and 1337 and is one petitioner is entitled to remove to this court pursuant to 28 USC §1441 because it is founded on a claim arising under a law of the United States, the Railway Labor Act, 45 USC §151 et seq., and the amount in controversy exceeds the sum of $10,000 exclusive of interest and costs."

(j) ARGUMENT
AMPLIFYING THE REASONS
RELIED ON FOR ALLOWANCE OF THE WRIT

The Court of Appeal Ninth Circuit in the instant matter so overlooked or misapprehended the law and facts applicable here as to result in a gross miscarriage of justice against which the Supreme Court should act.

THE COURT OF APPEAL WAS REQUIRED TO REVIEW THE GRANTING OF SUMMARY JUDGMENT DE NOVO

The district court's grant of summary judgment is reviewed **de novo** on appeal, Miller v. Fairchild Indus., Inc., 797 F.2d 727 (9th Cir. 1986); Gallon v. Levin Metals Corp., 779 F.2d 1439, 1440 (9th Cir. 1986).

A TRIABLE ISSUE OF FACT AS TO THE ESTOPPEL OF THE EMPLOYER TO CLAIM JUSTIFICATION FOR DISCRIMINATION BASED ON ECONOMIC DECLINE PROHIBITED GRANTING OF SUMMARY JUDGMENT ON THE DISCRIMINATION CLAIMS

Plaintiff presented ample evidence of discrimination by her employer. Even the lower court recognized that she had done so. (EX 89)

The lower court stated:

> "In the present case, plaintiff Sieu Mei has stated a prima facie case of discrimination. She is a member of three protected groups. Her job performance prior to her dismissal was at the very least satisfactory, and several of her superiors rated her work as excep-

> tional. She was furloughed instead of being transferred to SP in 1985. Other employees who were not over 40, female, or Asian, were transferred into positions at SP that Sieu Mei was qualified to perform. Thus, a prima facie showing of intentional discrimination has been made by plaintiffs."

Summary judgment would have been appropriate only if there had been no genuine issue of material fact of discrimination. But there was demonstrated such a material fact, so that granting of summary judgment, denied plaintiff the right to full discovery and trial by jury.

In Perez v. Curcio, (CA9th 1988) 841 F.2d 255, Perez, an employee of the City of Phoenix, brought a age discrimination against the city. Summary judgment for the city was granted by the District Court. On appeal the 9th Circuit reversed and remanded stating at 258:

> "In this case, Perez must demonstrate that the City's asserted reasons for her demotion and termination were pretextual; i.e., either that a discriminatory reason more likely than not motivated the employer or that the employer's explanation is unworthy of credence. In ruling on a sum-

> mary judgment motion "(t)he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in her favor." (citing authority) As long as Perez has introduced some evidence from which a jury could believe Perez's explanation rather than the City's explanation and material questions of fact exist, the case must go to a jury."

In the instant matter Plaintiff has set forth a history of discrimination against her beginning in 1982, where she has been treated differently than others, finally coming to the present day where she is in a position of being discriminated against in retaliation for her having called into question her employers discriminatory actions. Here Plaintiff was an exemplary employee, serving for 22 1/2 years the same employer, getting exemplary performance reports, being promoted, and receiving pay raises. Then when she is only 2 1/2 years away from fully qualifying for full retirement benefits (25 years service) the rug is yanked out, and jobs she has performed with distinction are given to younger inexperienced and/or lesser experienced people. Every other of her co workers are protected but she is signalled out for example

and denied her job and dignity.

In Rollins v. Techsouth, Inc. (CA 11th 1987) 833 F.2d 1525 at 1528 the court reviewed the criteria for establishing a prima facie case of age discrimination. It stated:

> "The plaintiff must first establish a prima facie case of age discrimination, by showing (1) that plaintiff was between forty and seventy, and thus in the protected age group, (2)that plaintiff was qualified to do the work, (3) that the employer discharged plaintiff, and (4) that the employer subsequently replaced plaintiff or sought a replacement. If plaintiff can establish a prima facie case, a presumption arises that defendant fired plaintiff for discriminatory reasons."

In the instant matter Plaintiff has shown that she was 59 years of age when discharged (EX 526), that she was qualified to do the work (EX 733) that she was discharged (EX 608 & 733), the employer subsequently replaced plaintiff (EX 735-737).

In the instant matter, plaintiff presented evidence that the employer represented to her that she was "fully protected" (EX 15). In reliance on that she continued to perform her employment

duties above average without complaint, suffered extreme treatment, stayed with the employer even though her commute was significantly increased when the offices were moved within the confines of the San Francisco General offices but to a less accessible location Brisbane. (EX 72, 74, 154-167, 309, 733).

Plaintiff, being the party opposing motion for summary judgement with sworn declarations is entitled to her sworn statements taken as true for purposes of deciding the motion; the court can not resolve credibility issues with respect to direct evidence. McLaughlin v. Liu (9th Cir 1988) 849 F.2d 1205. That court quoted at 1208 with favor from T. W. Elec. Serv. v. Pacific Electric Contractors Assn. (9th Cir. 1987) 809 F.2d 626, 630-31 as follows:

> "... the judge does not weigh conflicting evidence with respect to a disputed material fact....Nor does the judge make credibility determinations with respect to statements made in affidavits, answers to interrogatories, admissions, or depositions....These determinations are within the province of the fact-finder at trial. Therefore, at summary judgment, the judge must view the evidence;

> in the light most favorable to the nonmoving party; if direct evidence produced by the moving party conflicts with direct evidence produced by the nonmoving party , the judge must assume the truth of the evidence set forth by the nonmoving party with respect to that fact."

The single page representation of the employer (Ex 937), the oral representations of her superiors that she was "fully protected" (EX 15), and the collective bargaining agreements (Ex 938) establish the making of a statement on which it was intended plaintiff would rely, and the evidence presented by plaintiff demonstrates that she did so rely on the representations, so that the triable, material issue of estoppel was presented by plaintiff making the granting of summary judgment to the employer inappropriate.

Clearly an issue of the employer being estopped from claiming the right to discriminate against her based on a decline in business is a triable issue of fact so that summary judgement should not have been granted.

SUMMARY JUDGEMENT SHOULD NOT BE GRANTED WHERE A TRIABLE ISSUE OF FACT IS PRESENTED BY PLAINTIFF THAT THE EMPLOYERS RELIANCE ON DECLINE IN BUSINESS IS A PRETEXT TO COVER THE DISCRIMINATION EXERCISED AGAINST PLAINTIFF. WHERE AS HERE

PLAINTIFF PRODUCES EVIDENCE THAT THE EMPLOYER IS CONTRACTUALLY BOUND NOT TO DISCHARGE PLAINTIFF BECAUSE OF ECONOMIC DECLINE, THE EMPLOYER PURPOSEFULLY CAUSED THE ECONOMIC DECLINE, WHEN THE BUSINESS WAS TRANSFERRED BACK TO THE HEADQUARTERS BUILDING OF THE SP, IT PROSPERED, PLAINTIFF IS THE ONLY EMPLOYEE TREATED IN THIS FASHION, AND NEW, YOUNGER, NON CHINESE EMPLOYEES, WITH LESS EXPERIENCE THAN PLAINTIFF ARE HIRED TO PERFORM THE DUTIES PREVIOUSLY PERFORMED BY PLAINTIFF.

The issue presented here of an employer purposefully causing an economic decline in aid of a planned merger with another railroad, in order to circumvent a collective bargaining agreement and using that decline in business as a pretext for discriminating against an employee appears to be an issue of first impression. Under California contract law of offer and acceptance, it appears evident, that the collective bargaining agreements involved in the instant matter, to the extent they provide for the right of the employer to "furlough" employees during a formulated decline in business (EX 971) or where business is interrupted by emergencies (EX 962), were intended to concern themselves only with conditions beyond the employer's control, but the intent and purpose of the agreement can not be to allow the invocation of

those provisions when the employer causes the conditions for the very purpose of negating the contractual terms.

The fact that the employees inorder to protect themselves when these conditions apply must stand ready to return to work on two weeks notice further demonstrates the intent and purpose of these provisions to deal with temporary conditions of the market not purposefully created by the employer.

To allow such conduct would be to make a mockery of the collective bargaining process.

SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED DEFENDANT EMPLOYER ON DISCRIMINATION CAUSE OF ACTION WHEN THERE IS A MATERIAL TRIABLE ISSUE OF FACT OF VIOLATION OF STATE STATUE PROHIBITING DISCRIMINATION AGAINST EMPLOYEES BASED ON THEIR EXERCISE OF RIGHT TO INSTITUTE PROCEEDINGS CLAIMING DISCRIMINATION

In the instant matter, there is a triable issue of fact presented of discrimination post discharge of plaintiff because of her exercise of her right to institute proceedings concerning her discriminatory discharge. Post termination, she interviewed for a clerk's position at SP as a new hiree, was not hired, while numerous jobs of the

categories previously performed by Sieu Mei Tu with distinction have been created and filled with new younger workers (EX 733 & 736-738). All other employees at PFE, including the Union Local Chairman, Mr. Balovich, have all been rehired at SP, given the opportunity of substantial severance pay benefits or continue employment, or allowed to retire with full retirement rights to age 65, or other golden parachute provisions. Sieu Mei Tu is the only terminated employee who has not received such benefits. She is the only terminated employee the employer was contractually obligated to give "full protection" , being the only employee on the roster at termination with a seniority date prior to March 16, 1963 (EX 736-738).

Where the party opposing summary judgment presents evidence that tends to support her claim, as here where plaintiff has presented retaliatory discrimination evidence, summary judgment should not have been granted. To have done so was a gross miscarriage of justice.

In Eisenberg v. Insurance Co. of N. Am. (CA

9th, 1987) 815 F2d 1285, Plaintiff brought an action against his former employer, an insurance company alleging retaliatory discharge and fraud. Defendant employer moved for summary judgment, claiming that the fraud claim was unfounded and that other claims were time-barred. In his response to the motion, Plaintiff asserted that he had been fired for refusing to violate California Law. The district court granted summary judgment for defendants on all claims, ruling that plaintiff's response to the motion was conclusory and thus inadequate. The court of appeals reversed, holding that summary judgment was improperly granted.

The court stated at 1290:

> "However, termination in retaliation...would not constitute discharge for good cause....ICNA merely asserts that it had good cause to terminate the Appellant's employment--namely, considerations of economy. The Appellant, however, has adduced his declaration and the memoranda as direct evidence to contradict this assertion. Since the evidence must be taken as true, T. W. Electrical at 630-31, the Appellant's breach of contract claim is not vulnerable to summary disposition."

DEFENDANT RAILROADS WERE NOT ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFFS TORT CLAIMS ON THE BASIS THAT THE TORT CLAIMS FRAMED IN THE FIRST AND SECOND AMENDED COMPLAINTS ARE MINOR DISPUTES, SO THAT THE SOLE REMEDY IS ARBITRATION UNDER THE COLLECTIVE BARGAINING AGREEMENT.

PLAINTIFF WAS ENTITLED TO PROCEED ON HER CLAIMS AND WAS NOT LIMITED TO ARBITRATION UNDER THE COLLECTIVE BARGAINING AGREEMENT. FAILURE TO ALLOW PLAINTIFF TO DO SO WAS A GROSS MISCARRIAGE OF JUSTICE, AND IN CONFLICT WITH OTHER CIRCUITS.

In the lower court the railroad defendants argued that Plaintiffs exclusive remedy on her tort claims for infliction of mental distress and discrimination was arbitration under the collective bargaining agreement within the confines of administrative action under the RLA and the lower court so ruled (EX 306). Under the circumstances of this case, this was patently incorrect. In Atchison, Topeka and Santa Fe Railway Company v. Jim Buell, (1987) 107 S. Ct. 1410, 771 F2d 1320 (CA9th opinion) a railroad employee brought an action in tort for emotional distress arising from his employment conditions. The railroad filed an answer, asserting, among other defenses, that the employees sole remedy was before the NRAB. The District Court granted summary judgment to the railroad on this issue. The Ninth Circuit rev-

ersed, 771 F2d 1320. The Supreme Court on review stated at 1413:

> "Additionally, although the question had neither been raised by the parties, nor addressed by the District Court, the Court of Appeals proclaimed that a relevant "issue, one of first impression in this circuit, is whether a Railroad employee's wholly mental injury stemming from his railroad employment is compensable under the [FELA]." Id, at 1321. The Court of Appeals concluded that the FELA does authorize recovery for emotional injury."

The Supreme Court affirmed the Court of Appeals in its determination that the RLA does not preclude actions brought by railway employees against their employers for emotional injuries. Id, at 1418. In arriving at its decision, the Court stated at 1415:

> " The court has, on numerous occasions, declined to hold that individual employees are, because of the availability of arbitration, barred from bringing claims under federal statutes (citing authority). Although the analysis of the question under each statute is quite distinct, the theory running through these cases is that notwithstanding the strong policies encouraging arbitration, "different considerations apply where the employee's claim is based on

> rights arising out of a statute designed to provide minimum substantive guarantees to individual workers." (citing authority)
> The principle is instructive on the question before us. The FELA not only provides railroad workers with substantive protection against negligent conduct that is independent of the employer's obligations under its collective-bargaining agreement, but also affords injured workers a remedy suited to their needs, unlike the limited relief that seems to be available through the Adjustment Board. It is inconceivable that Congress intended that a worker who suffered a disabling injury would be denied recovery under the FELA simply because he might also be able to process a narrow labor grievance under the RLA to a successful conclusion. As then District Judge K. Skelly Wright concluded, " the Railway Labor Act...has no application to a claim for damages to the employee resulting from the negligence of an employer railroad."

Afortiori, the same must apply to a claim for damages resulting from the intentional acts of an employer railroad in discriminating against an employee in violation of her civil rights.

SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED WHEN PLAINTIFF-OPPOSING PARTY HAS BEEN DENIED DISCOVERY BY DEFENDANTS AND NONMOVING PARTY REQUIRES ADDITIONAL TIME FOR DISCOVERY.

Rule 56 (f) provides:

> "Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just."

In the instant matter, plaintiff demonstrated that defendants had prevented plaintiff from procuring discovery and advised the lower court of plaintiff's need to conduct discovery to meet the motions for summary judgment and dismissal (EX 694). It was a gross abuse of discretion, and a gross miscarriage of justice for the trial-court to proceed to judgment without plaintiff being given an order requiring the defendants to respond to the demands for discovery and for the Court of Appeal not to return the case to the trial court for further discovery. 6 Part 2 Moore's Federal Practice 56-304

SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED TO UNION DEFENDANTS. WHERE AS HERE THE UNION FAILED TO PERFORM PROCEDURAL OR MINISTERIAL ACTS WITHOUT ANY RATIONAL OR PROPER BASIS FOR THE UNION'S CONDUCT REFLECTING A RECKLESS DISREGARD FOR THE RIGHTS OF THE INDIVIDUAL EMPLOYEE SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED

The standard for finding a breach of the duty of fair representation by a union is whether the union's conduct is arbitrary, discriminatory, or in bad faith. Vaca v. Sipes 386 U>S> 171, 190, Peterson v. Kennedy, (CA 9th 1985) 771 F. 2d 1244, cert. denied ____ U.S. ___, 106 S. Ct. 1642 (1986). In the context of a grievance this standard prohibits a union from ignoring a meritorious grievance or processing that grievance perfunctorily. Galindo v. Stoody Co., (CA 9th 1986) 793 F.2d 1502.

In the instant matter the record demonstrates that the Union failed to perform the procedural act of advising the arbitrator of Sieu Mei Tu's claim of discrimination in her discharge, nor of her claim of discrimination in retaliation for her having exercised her right to claim discrimination, nor her claim of exemption from the decline in business exception under the collective bargaining agreement. Since the Union failed to consult with her attorney, investigate the claim made by Sieu Mei Tu, or take any action to resolve her dispute with her employer concerning her

individual situation, they engaged in a reckless disregard for the rights of Sieu Mei Tu and the granting of summary judgement to the union denying Sieu Mei Tu to her precious rights to discovery and trial by jury was a gross miscarriage of justice.

The Union made no claim it made a judgmental decision not to present all Sieu Mei Tu's claims. It's failure to do so was a procedural and/or ministerial act, not involving an exercise of judgment, were there was no rational or proper basis for the union's conduct.

The Union Defendant, undertook to represent the interests of the Plaintiff Sieu Mei Tu, a member of the union, in the administrative resolution of the matter of her claim for the Railroads wrongful and tortious breach of the collective bargaining contract of employment. In breach of its obligation of fair representation, the union failed to present any evidence to support plaintiffs claims of discrimination in termination, discrimination in rehiring in retaliation for bringing discrimination claim, exemption from dec-

line in business provisions for furloughing under the collective bargaining agreement.

In the leading case of Vaca v. Sipes, 386 U.S. 171 (1967), the Supreme Court held that the duty of fair representation could be enforced in a damage action by an employee against a union. That court granted to the union wide discretion in making the decision whether to take a grievance to arbitration, but provided that if the union does process the grievance it may not arbitrarily ignore a meritorious grievance or process in a perfunctory fashion. In Vaca supra at 191 the court stated:

> "... we accept the proposition that a union may not arbitrarily ignore a meritorious grievance or process it in perfunctory fashion...."

In Wise v. Southern Pacific Co. (1963) 223 CA2d 50; 35 C.R. 652, held that a railroad employee may bring and maintain a common-law or, where a state so provides, statutory action for damages for his wrongful discharge from employment in breach of a collective bargaining agreement, and is not barred from doing so by the Railway Labor Act. This view

was confirmed by the California Supreme Court in Wise v. Southern Pac. Co., 1 C3d 600; 83 CR 202; at 603. See also Shaw v. Metro-Goldwyn-Mayer, Inc., (1974) 37 CA 3D 587, 597; 113 CR 617.

In the instant action, Union decided to process administratively Plaintiff's claim for wrongful termination. However in processing that claim Union acted in an arbitrary, prejudicial, perfunctory manner in that Plaintiff's Union failed among other things to perform the procedural and ministerial duties of presenting evidence at the arbitration hearing held in regard to the claims of plaintiff, did not confer with the Plaintiff or her attorney concerning her claims, failed to make any claim of discrimination on behalf of Plaintiff, failed to protect her from retaliation by reason of the claims she made personally, and procedurally failed to advise the arbitrator the application of decline in business to Plaintiff's "furlough" was inappropriate despite the inapplicability of that provision to her by reason of her seniority. (EX 602)

Union failed to act from a conflict of inter-

est, in that at the time it was suppose to be fairly representing Plaintiff it was acting in its own self interest seeking to purchase Defendant SP, and simultaneously seeking to become the bargaining unit for any combined railroad in the event the pending sale to Santa Fe or some other railroad was ultimately approved.(EX 189-193, 884)

Rule 56 Rules of Civil Procedure does not permit entry of summary judgment, where there are, as here, genuine material issues of fact. In Traylor v. Black, Sivalls & Bryson, (CA 8th, 1951) 189 F2d 213, at 216, the court stated the rule as follows:

> "A summary judgment upon motion therefor by a defendant in an action should never be entered except where the defendant is entitled to its allowance beyond all doubt. To warrant its entry the facts conceded by the plaintiff, or demonstrated beyond reasonable question to exist, should show the right of the defendant to a judgment with such clarity as to leave no room for controversy, and they should show affirmatively that the plaintiff would not be entitled to recover under any discernible circumstances....A summary judgment is an extreme remedy, and under the rule, should be awarded only when the truth is quite clear....And all reasonable doubts touching the existence of a genuine issue as to a material

> fact must be resolved against the party moving for summary judgment."

See also Lane Bryant v. Maternity Lane, Ltd. of California, (CA9th 1949)173 F2d 559;Lew v. Kona Hospital, (CA9th, 1985) 754 F2d 1420; Eisenberg v. Insurance Co. of North America (CA9th, 1987) 815 F2d 1285.

THE RAILROAD DEFENDANTS SHOULD NOT HAVE BEEN DISMISSED FROM THE ACTION

In reviewing orders of dismissal, the court of appeals must view the evidence most favorable to the plaintiff, and plaintiff was entitled to the benefit of all inferences that may be reasonably drawn from the evidence presented. Reimche v. First Nat. Bank of Nevada, (CA 9 1975) 512 F2d 187. The failure of the Ninth Circuit to grant Plaintiff the benefit of those inferences resulted in a gross miscarriage of justice.

SUMMARY JUDGMENT WAS NOT GRANTED ON THE FIRST AMENDED COMPLAINT ON PLAINTIFF'S CAUSES OF ACTION FOR INTENTIONAL AND/OR NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS, CONSPIRACY, BREACH OF CONTRACT OF EMPLOYMENT, BREACH OF GOOD FAITH AND FAIR DEALING CONSPIRACY NOR ON ANY CAUSES OF ACTION AGAINST RAILROAD DEFENDANTS, YET THE DISTRICT COURT DISMISSED WITH PREJUDICE THE ENTIRE SECOND AMENDED COMPLAINT WHICH HAD BEEN SERVED ON ALL RAILROAD DEFENDANTS AND UNION

DEFENDANTS AND THE COURT OF APPEAL SUSTAINED THAT ACTION, RESULTING IN A GROSS MISCARRIAGE OF JUSTICE

The District Court by its order of May 3, 1989, (EX 915) directed Plaintiffs to file an amended complaint by June 2, 1989. Plaintiffs complied by filing a Second Amended Complaint (EX 919). All railroad and all Union defendants were served by mail (EX 1129). None of the Railroad defendants responded in any fashion to the Second Amended Complaint.

Defendant Union filed a motion to strike causes of action one through five, seven, and eight, and moved for summary judgment as to the sixth cause of action

The District Court incorrectly ruled:

> "Since only 'Doe' defendants remain in the action, this Court DISMISSES plaintiffs' second amended complaint WITH PREJUDICE." (EX 1143)

All parties who have appeared in an action remain in the action until a final judgment is rendered. In this action, when the Second Amended Complaint was filed and served, there was no final judgment. Therefore the District Court's position

that only doe defendants remained was grossly in error, and its ruling dismissing the Second Amended Complaint was a gross abuse of discretion resulting in a gross miscarriage of justice, necessitating the Court of Appeal to remand the state causes of action to the Superior Court of the State California, in and for the City and County of San Francisco, and the federal causes of action to the District Court for jury trial against all defendants. Dayton Board of Education v. Brinkman (1977) 433 US 406.

SECOND AMENDED COMPLAINT ANSWERED COURTS BASIS THAT FOR VIOLATION OF 49 USC 11347 MUST FIRST GO TO ICC. SECOND AMENDED COMPLAINT ALLEGED THAT PROCEEDINGS WERE COMMENCED BEFORE ICC AND ICC AUTHORIZED INDIVIDUAL EMPLOYEES TO PROCEED WITH CIVIL REMEDIES, THEREFOR DISMISSAL OF SECOND AMENDED COMPLAINT WAS A GROSS ABUSE OF DISCRETION

By its order dated June 30, 1988 (EX 305), the District Court dismissed Plaintiff's fifth cause of action for conspiracy and violation of 49 USC 11347, as follows:

> "Insofar as a private cause of action might exist for termination due to the aborted merger, this court concludes that it is not the proper forum for an initial determination of this matter. The Interstate Commerce Commission is the appropriate agency for an

> initial determination of any claimed violation of 49 U.S.C. §11347, which provides for employee protection in any rail carrier merger." (EX 305)

Thereafter, by order of court, a Second Amended Complaint was filed (EX 919). In that verified Second Amended Complaint, plaintiff set forth the decision of the ICC (Ex 1124), which provided that ICC would not proceed with determination of the claims of the individual employees under 49 USC 11347. The District Court then proceeded sua sponte to dismiss the Second Amended Complaint. This action was a gross abuse of discretion and grievous error, causing plaintiff to be denied a fair hearing on her claim, and a gross miscarriage of justice. The failure of the Court of Appeal to remand and direct the lower court to proceed to trial again resulted in the denial of a fair hearing to Sieu Mei Tu, and was a gross miscarriage of justice.

IT WAS GROSS ABUSE OF DISCRETION AND GRIEVOUS ERROR, WHICH DENIED PLAINTIFF A FAIR HEARING FOR THE DISTRICT COURT TO REFUSE PLAINTIFFS MOTION TO REMAND THE ORIGINAL COMPLAINT TO STATE COURT

When the trial court grossly abuses its dis-

cretion and or commits grievous error, so as to deny plaintiff a fair hearing on her claim, the reviewing court must remand and direct the lower court. Dayton Board of Education v. Brinkman The failure of the Court of Appeal to do so was in conflict with decisions of other circuits and a gross miscarriage of justice.

THE ORIGINAL COMPLAINT WELL PLED STATE COURT CAUSES OF ACTION, IT WAS FILED IN THE STATE COURT AND WRONGFULLY REMOVED TO THE DISTRICT COURT. ON PLAINTIFFS MOTION TO REMAND BACK TO THE STATE COURT IT WAS GROSS ERROR NOT TO DO SO.

Plaintiffs' complaint in this matter alleges various tortious causes of action based on negligent and or intentional bad faith, unfair, oppressive, fraudulent and malicious termination of plaintiff Sieu Mei Tu's long standing employment by Defendant Pacific Fruit Express, in violation of laws of the State of California. The Complaint sought special damages; general damages for emotional distress; and punitive damages.

The question of whether the federal district court had jurisdiction of the subject matter of the complaint (ie the nature of the action) which had been removed from the state court, was

required to be answered under California law. Electronic Race Patrol, Inc. (D.C.N.Y. 1961) 191 F. Supp. 364. Removal statutes are strictly constructed in favor of state court jurisdiction. Strange v. Arkansas-Oklahoma Gas Corp. (D. C. Ark. 1981) 534 F. Supp. 138. Removal statutes are to be strictly construed against removal and in favor of remand. Heatherton v. Playboy. Inc. (D.C. Cal 1973) 60 F.R.D. 372.

28 USCA 1445 (a) provides:

> "A civil action in any State court against a railroad...arising under sections 51-60 of Title 45, may not be removed to any district court of the United States."

45 USCA 51 provides:

> "Every common carrier by railroad while engaging in commerce between any of the several states ...shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce....

The complaint in this matter was brought by two plaintiffs. All of the causes of action of the complaint were actions under state law, involving issues of grave concern to the State of California and deeply rooted in its legal system.

Plaintiffs neither alleged nor relied on the Railway Labor Act. All causes of action were pled under state law. The complaint was properly filed in state court and the issues raised should have been tried in state court. The Railway Labor Act does not preempt plaintiffs' state court actions.

In Caterpillar Inc. v. Williams, 107 S.Ct. 2425 (1987), the United States Supreme Court by Justice Brennan held that where former employees brought action against former employer for breach of individual employment contracts, the action was removed, and the United States District Court for the Northern District of California, Charles A. Legge, J., denied motion to remand , and dismissed, the Supreme Court ruled on basis that (1) complaint asserting breach of individual employment contracts was not completely preempted by federal labor law, and (2) fact that employer raised defense that individual contracts were superseded by subsequent collective bargaining agreement, and thus preempted by federal labor law, did not establish that employees claims were removable.

The court stated at 2429:

> "Only state court actions that originally could have been filed in federal court may be removed to federal court by the defendant. Absent diversity of citizenship, federal question jurisdiction is required. The presence or absence of federal-question jurisdiction is governed by the "well-pleaded complaint rule," which provides that federal jurisdiction exists only when a federal question is presented on the face of plaintiff's properly pleaded complaint. See Gully v. First National Bank, 299 U.S. 109, 112-113, 57 S.Ct. 96, 97-98, 81 L.Ed. 70 (1936). The rule makes the plaintiff the master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law.

In the instant matter the common law agreement is subsequent to the collective bargaining unit and is magnificently simple in its application. (EX 15) It provides that in addition to her rights under the collective bargaining agreement, "even if her present position were to be eliminated, we would find some other position for her to hold...." This does not require interpretation or application of the collective-bargaining agreement. It presents a simple contract right between two contracting parties, easily under-

stood, and applied. It presents no federal issues. The tort claims alleged also presented state court causes of action which should not have been removed and should have been remanded by the Ninth District Court of Appeal. Failure to do so was a departure so far from the accepted and usual course of justice as to call on this Court's power of supervision, to prevent a gross miscarriage of justice, and conflict between the circuits.

In Caterpillar Inc. v. Williams, supra, the court points out, at 2431:

> "... individual employment contracts are not inevitably superseded by any subsequent collective agreement, covering an individual employee, and claims based upon them may arise under state law. Caterpillar's basic error is its failure to recognize that a plaintiff covered by a collective-bargaining agreement is permitted to assert legal rights independent of that agreement, including state-law contract rights, so long as the contract relied upon is not a collective bargaining agreement. (citing authority) Caterpillar impermissibly attempts to create the prerequisites to removal by ignoring the set of facts (i.e. the individual employment contracts) presented by respondents, along with their legal characterization of those facts, and arguing that here are different facts

> respondents might have alleged that would have constituted a federal claim. In sum, Caterpillar does not seek to point out that the contract relied upon by respondents is in fact a collective agreement; rather it attempts to justify removal on the basis of facts not alleged in the complaint. The "artful pleading" doctrine cannot be invoked in such circumstances.

The court specifically states at 2427:

> " The presence or absence of federal-question jurisdiction is governed by the "well-pleaded complaint rule," which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint. (citing authority) The rule makes the plaintiff the master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law."

Again the court in Caterpillar at 2430 states:

> "Caterpillar assets that respondents' state-law contract claims are in reality completely pre-empted Section 301 claims, which therefore arise under federal law. We disagree. Section 301 governs claims founded directly on rights created by collective-bargaining agreements, and also claims "substantially gaining dependent on analysis of a collective bargaining agreement." (Citing authorities). Respondents alleged that Caterpillar had entered in and breached individual employment contracts with them.

> Section 301 says nothing about the content or validity of individual employment contracts. It is true that respondents, bargaining unit members at the time of the plant closing, possessed substantial rights under the collective agreement, and could have brought suit under Section 301. As masters of the complaint, however, they chose not to do so.

The court goes on to hold that the Respondents claims do not arise under federal law and therefore may not be removed to federal court. The court also points out that the defendants can not interject a federal question into an action in order to raise a federal issue and defeat plaintiffs state court actions. (Caterpillar at 2433).

THE DEFENDANTS ALLEGED IN THE DISTRICT COURT THAT SIEU MEI TU'S EMPLOYER WAS A CARRIER FOR PURPOSES OF REMAND TO THE FEDERAL COURT FROM THE STATE COURT, AND ARGUED IN THE DISTRICT COURT AND NINTH CIRCUIT COURT OF APPEAL THAT PLAINTIFFS EXCLUSIVE REMEDY ON HER CONSPIRACY CLAIM WAS BEFORE THE ICC, BECAUSE HER EMPLOYER WAS A CARRIER, AND THEN ARGUED BEFORE THE ICC THAT PLAINTIFF SIEU MEI TU HAD NO RIGHT TO LITIGATE ANY ASPECT OF HER TERMINATION BEFORE THE ICC BECAUSE HER EMPLOYER WAS NOT A CARRIER. THIS RESULTED IN A GROSS MISCARRIAGE OF JUSTICE.

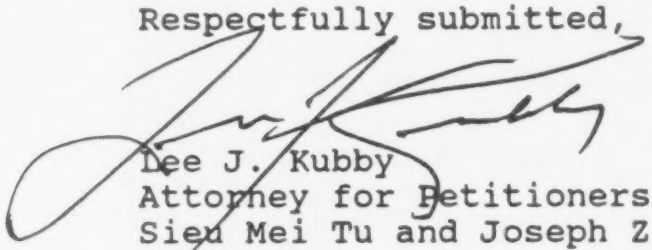
These inconsistent and incorrect arguments of counsel as set out above are attached as excerpts in the appendix to this petition. As officers of the court, the attorneys for the employers have

misused their privilege and caused a gross miscarriage of justice to occur, denying Plaintiff her right to a jury trial and full discovery. This conduct attacks the integrity of the judicial process and militates the supervision of this Court.

CONCLUSION

For the foregoing reasons, the petitioner respectfully prays that its petition for a writ of certiorari be granted.

Respectfully submitted,



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Dated: December 21, 1992

(k) APPENDIX

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CATHY A CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SIEU MEI TU and JOSEPH Z. TU,

Plaintiffs/appellants/
Cross-appellees,

CA Nos. 89-16186, 89-16292

V. DC No. CV-87-1198-DLJ

SOUTHERN PACIFIC TRANSPORTATION CO.,) PACIFIC FRUIT EXPRESS CO., ATCHISON;) TOPEKA, SANTA FE RAILROAD CO., SANTA FE SOUTHERN PACIFIC CORP., and BROTHERHOOD OF RAILWAY,AIRLINE, AND STEAM-SHIP CLERKS,

MEMORANDUM

Defendants/appellees/ Cross-appellants.

Appeal from the United States District Court for the Northern District of California

D. Lowell Jensen, District Judge, Presiding

Argued and Submitted September 12, 1991

San Francisco, California

BEFORE: CANBY and KOZINSKI, Circuit Judges, and CARROLL**, District Judge

*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3. **The Honorable Earl H. Carroll, United States District Judge for the District of Arizona, sitting by designation.

OVERVIEW

Plaintiffs Sieu Mei Tu and Joseph Z. Tu, her husband, appeal from the District Court's orders denying plaintiffs' motion to remand, and granting defendants' motions to dismiss and motions for summary judgment. Defendant Brotherhood of Railway, Airline and Steamship Clerks cross appeals.

FACTUAL BACKGROUND

In May, 1962, Sieu Mei Tu ("Tu" or "plaintiff"), a woman of Chinese Ancestry who is now 64 years old, began working in various clerical positions for

Pacific Fruit Express Company ("PFE"), a wholly-owned subsidiary of Southern Pacific Transportation Company ("SP"). Plaintiff was a member of the Brotherhood of Railway, Airline and Steamship Clerks ("Union").1 When PFE merged with SP in 1985, the plaintiff was furloughed from her position. The Union filed a grievance on August 15, 1985, alleging that the collective bargaining agreement prohibited the company from laying off plaintiff and seven other clerical workers without payment of certain sums. On November 30, 1987, the arbitrator held against the Union, holding that the employer had a right under the collective bargaining agreement to lay off the clerks due to the decline in business experienced by PFE.

Before the case went to arbitration, the plaintiff filed a charge of discrimination tiff filed a charge of discrimination with the California Department of Fair

Effective September 1, 1987, the Union changed its name to Transportation Communications International Union.

Employment and Housing ("DFEH"), alleging discri-

mination on the basis of race, sex or age. Pursuant to her right-to-sue letter from DFEH, plaintiff filed a lawsuit on September 26, 1986, in the San Francisco County Superior Court against PFE, SP, the Atchison, Topeka, Santa Fe Railroad Company ("ATSF"), Santa Fe Southern Pacific Corp. ("SFSP"), various individuals, and Doe corporations. The plaintiff's complaint alleged two counts of wrongful termination, violation of good faith and fair dealing, violations of 42 U.S.C. SS 1981, 1983, 1985, California Code S 12900, et. seq., and California Public-Utilities Code S 453(a), conspiracy, and loss of consortium. The action was removed to the United States District Court for the Northern District of California on March 20, 1987. The plaintiff moved to remand the action to state court, which was denied

denied by the Honorable D. Lowell Jensen on October 13, 1987. The District Court ruled that federal jurisdiction existed due to the plaintiff's membership in a union whose conditions of employment were governed by a collective bargaining agreement negotiated pursuant to the Railway Labor Act ("RLA"). 45 U.S.C. S 151, et. seq.

Defendants SP and PFE thereafter moved to dismiss the complaint. On April 6, 1988, the District Court did so, agreeing with the defendants that the wrongful termination claims and breach of good faith and fair dealing claim were "minor disputes"

2 As only the consortium claim involves plaintiff Joseph Tu, the singular "plaintiff", will be used throughout this disposition.

within the meaning of the RLA and must thus be referred to the National Railroad Adjustment Board ("NRAB") for mandatory arbitration. The Court declined to exercise pendent jurisdiction over the state discrimination claims and consortium claim.3 The plaintiff was given leave to amend the complaint within 30 days in order to

state a federal claim.

The plaintiff filed her First Amended Complaint on may 2, 1988, again alleging wrongful termination, breach of good faith and fair dealing, violations of 42 U.S.C. SS 1981, 1983, 1985, California Government Code S 12900, et. seq., and California Public Utilities Code S 453(a), conspiracy, and loss of consortium. The plaintiff added a claim against the Union for breach of fair representation. On July 1, 1988, upon motion by defendants, the District Court dismissed defendant ATSF and SFSP pursuant to Fed.R.Civ.P. Rule 4(j), for plaintiff's failure to timely serve. Further, the District Court again dismissed Counts 1 - 3 alleging wrongful termination and breach of good faith and fair dealing, and Count 7 for intentional infliction of emotional distress, as "minor disputes" subject to mandatory arbitration. The Court further dismissed Count 5, alleging conspiracy of all defendants to merge SP with ATSF and cease operations of PFE in order to avoid their contractual responsibilities to

plaintiff, holding that the ICC was the proper forum for the initial determination of violations

3 The District Court did not address the claims for violations of 42 U.S.C. SS 1981, 1983 and 1985, or the conspiracy count. of 49 U.S.C. S 11347. Finally, the Court dismissed the claim against the Union for failing to file within the applicable statute of limitations. Two counts remained: the District Court exercised pendent jurisdiction over plaintiff's claim for discrimination and plaintiff Joseph Tu's claim for loss of consortium against defendants SP and PFE; the Court construed the claims as state claims for discrimination.4 On January 5, 1989, defendants PFE and SP filed a motion for summary judgment which was granted on February 6, 1989. The Court held that although the plaintiff had established a prima-facie case of employment discrimination, the defendants had introduced substantial proof of a nondiscriminatory, legitimate reason for her furlough, that is, that PFE had experienced economic decline and the plaintiff's position was not needed at SP when PFE'S business was transferred to the parent company. Further, the plaintiff had

not introduced sufficient evidence to satisfy her burden of showing that the defendants, asserted nondiscriminatory reason was pretextual. Because Joseph Tu's claim for loss of consortium was wholly reliant on the success of plaintiff Sieu Tu's claims, that claim was dismissed. Judgment was entered on February 8, 1989. The plaintiff thereafter moved for reconsideration. On May 5, 1989, the Court denied the motion for reconsideration

4The District Court did not explain why it did not address the claims under 42 U.S.C. SS 1981, 1983, and 1985, although the plaintiff does not challenge this decision, presumably because the plaintiff seeks to remand the action.

regarding summary judgment to defendants SP and PFE, but granted the motion for reconsideration as to the Union. The Union appeals this ruling. The plaintiff filed a Second Amended Complaint on June 2, 1969, again alleging wrongful termination, breach of good faith and fair dealing, violations of 42 U.S.C. SS 1981, 1983, 1985, California Government Code S 12900, et. seq., and California Public Utilities Code S 453(a), conspiracy, loss of consortium, and breach of

fair representation by the Union. The Union responded to the second Amended complaint by filing a motion for summary judgment. The District Court granted that motion on August 14, 1989, holding that the plaintiff had made no evidentiary showing that the Union's actions were discriminatory or taken in bad faith. The Court also dismissed the individual union officials, which is not challenged by the plaintiff on appeal.

Plaintiff appeals the denial of her motion to remand to state court, the dismissal of defendants ATSF and SFSP for plaintiff's failure to timely serve under Fed.R.Civ.P., Rule 4(j), the dismissal of plaintiff's claims of conspiracy and intentional infliction of emotional distress, the denial of her request for more time for discovery, and the granting of summary judgment in favor of defendants SP; PFE and the Union.

The Union appeals the District Court's finding that the statute of limitations for plaintiff's breach of fair representation claim had not

lapsed.

DISCUSSION

(1) Denial Of Plaintiff's motion to remand

The denial of a motion to remand to state court is reviewed de novo. Chmiel v. Beverly Wilshire Hotel Co., 873 F.2d 1283, 1285 (9th Cir. 1989). Under the well-pleaded complaint rule, federal jurisdiction exists only if a federal question is presented on the face of a complaint. Caterpillar. Inc. v. Williams, 482 U.S. 386, 107 S.Ct. 2425, 2428, 96 L.ed.2d 318 (1987). A case may not be removed based on a defense unless an area of state law has been completely preempted,

and the claim is therefore considered as arising under federal law. Franchise Tax Bd. of Cal. v. Construction Laborers Vacation Trust, 463 U.S. 1, 24, 103 S.Ct. 2841, 2853, 77 L.ed.2d 420 (1983). Plaintiff first argues that all causes of action were pled under state law and that the District Court erred in failing to remand the suit. In point of fact, Count 4 of the original complaint alleges violations of 42 U.S.C. SS 1981, 1983 and 1985. The District Court denied the plaintiff's motion to remand, holding that the state law claims constituted "minor disputes" under the RLA, 45 U.S.C. S 151, et sea. If plaintiff's claims are characterized as "minor disputes" within the meaning of the RLA, state law is preempted and her exclusive remedy is under the RLA. Andrews v. Louisville & N.R.CO., 406 U.S. 320, 92 S.Ct. 1562, 32 L.ed.2d 95 (1972). If the defendants, actions are "arguably" governed by the collective bargaining agreement or have a "not obviously insubstantial" relationship to the contract, the dispute is "minor" and governed by the RLA. Magnuson v.

Burlington Northern, Inc., 576 P.2d 13671 1369-70 (9th Cir.), cert. denied 439 U.S. 930; 99 S.Ct. 318, 58 L.ed.2d 323 (1978). Alternatively, "minor" disputes involve the "interpretation or application of collective bargaining agreements".1 Edelman v. Western Airlines, Inc., 892 F.2d 8391 843 (9th Cir. 1989). The plaintiff argues that reference to the collective bargaining agreement is unnecessary, and that the action-can therefore be decided under state law. Plaintiff contends that she and her employer have a "common law agreement" arising out of a letter written on December 18, 19781 by plaintiff's employer in order to assist Mrs. Tu in her father's immigration to the United States. The letter states:

> Mrs. Tu was employed by this company on may 31, 1962 and has worked continuously for us from that date. Her position with this company is not only permanent in nature but she also is, under our contract with the Brotherhood of Railway, Airline a Steamship Clerks, "fully protected" sc that in the unlikely event we were not to have a job for her, she would continue to be paid under that contract until she reaches age 65 and can retire under the provi-

> sions of Railroad Retirement Act and receive the appropriate pension therefrom... She is, and has always been, a valued employee and even if her present position were to be eliminated, we would find some other position for her to hold as we would not want to lose her services.

The letter on which plaintiff bases her claims refers to the collective bargaining agreement as the source by which the plaintiff is "fully protected". Further, plaintiff's complaint alleges that certain promises were implied lby said defendant's contract with plaintiff's bargaining agent., and that plaintiff is la beneficiary of contract of employment entered into between defendant PFE and defendant [Union]., Reference to the collective bargaining agreement in the complaint and reliance on the contract through the grievance process brings the complaint within federal preemption. Newberry v. Pacific Racing Ass'n, 854 F.2d 1142, 1147 (9th Cir. 1988).5

While plaintiff cites Caterpillar, Inc., supra, for the contention that remand is required where an employee alleges breach of an individual

employment contract, in Caterpillar the employees relied on contracts made while they were salaried employees not covered by a collective bargaining agreement. Here, the plaintiff was covered by the collective bargaining agreement at all relevant times. In addition, "any independent agreement of employment could be effective only as part of the collective bargaining agreement." Stallcop v. Kaiser Foundation Hospitals, 820 F.2d 1044; 1048 (9th Cir. 1987). citing Olgguin v. Inspiration Consol. Copper Co., 740 F.2d 1468, 1474 (9th Cir. 1984). Thus, plaintiff's claims are "arguably", governed by the collective bargaining agreement and have a

"not obviously insubstantial"

5In Lingle v. Norge Division of Magic Chef, Inc., 486 U.S. 399, 108 S.Ct. 1877, 1885, 100 L.ed.2d 410 (1988), the Supreme Court held that state law is preempted by S 301 of the Labor Management Relations Act of 1947 "only if such application requires the interpretation of a collective-bargaining agreement.1 The Court in Newberry, 854 F.2d at 1147, determined that reference to the collective bargaining agreement in the complaint and reliance on the grievance process required interpretation of the collective bargaining agreement.

relationship to the contract. The plaintiff also argues that under 28 U.S.C. S 1445(a), all civil

actions against a railroad arising under the Federal Employer's Liability Act ("FELA"), 45 U.S.C. ss 51-60, are not removable. However, the plaintiff has not alleged a claim under FELA. The District Court properly denied the plaintiff's motion to remand, and this Court has jurisdiction pursuant to 45 U.S.C. S 151, et seq

(2) Dismissal of defendants ATSF and SFSP for Plaintiff's failure to timely serve under Fed.R.Civ.P., Rule 4(j)

This Court reviews a dismissal of a complaint pursuant to Rule 4(j) for abuse of discretion. Wei v. State of Hawaii, 763 F.2d 370 (9th Cir. 1985).

On July 1, 1988; the District Court dismissed defendants ATSF and SFSP for plaintiff's failure to serve the defendants within 120 days, finding that plaintiff had not demonstrated good cause for her failure to do so.

Plaintiff first argues that the District Court in fact gave her an extension of time to serve defendants ATSF and SFSP, based on the following colloquy during the hearing on the motion to remand:

> THE COURT: I think we also ought to schedule a status conference on this matter for about 60 days. Could you give us a date in November?
>
> MR. KUBBY [plaintiff's counsel]: Your honor, if it's going to be necessary to serve all of the other defendants, I wonder if 60 days ...
>
> THE COURT: Maybe we'll give you some more time than that. There isn't any real reason to have it earlier. Let's put it on December 16th. That will be at 9:00 o'clock and we'll review where we are at that time. In the meantime you can discuss this issue among yourselves.

This language -- ambiguous at best -- does not clearly indicate that the District Court extended the time for service. Further, the plaintiff did not raise this issue before the District Court, and Rule 46 of the Federal Rules of Civil Procedure provides that a party Ishould make[] known to the court the action which the party desires the court to take or the party's objection to the action of the court and the grounds therefor... I The limited exceptions to the general rule that failure to raise an issue in the trial court will prevent review include,

(1) when review is necessary to prevent a miscarriage of justice or to preserve the integrity of the judicial process, (2) when a change in law raises a new issue while an appeal is pending, and (3) when the issue is purely one of law. Javanovich v. United States, 813 F.2d 1035, 1037 (9th Cir. 1987). citing Bolker v. Commissioner of Internal Revenue, 760 P.2d 1039, 1042 (9th Cir. 1985). Plaintiff does not argue the applicability of these exceptions, and none of these factors militates in favor of their application. Plaintiff cannot therefore argue on appeal that the District Court extended the time period for service.

Next, plaintiff argues that she showed good cause for her failure to serve defendants. Plaintiff has the burden of showing good cause. Geiger v. Allen, 850 F.2d 330 (7th Cir. 1988); Townsel v. Contra Costa County, CA, 820 F.2d 319, 320 (9th Cir.

First, plaintiff contends that she purposefully did not serve ATSF and SFSP due to defendant SP's request that plaintiff delay service on those

defendants in order to facilitate settlement. However, plaintiff cites nothing in the record to support this contention.6 Second, plaintiff argues that she had good cause to believe that the case would be remanded to the California state court, where three years is allowed for service. However, given that plaintiff's complaint alleged violations of federal statutes, including 42 U.S.C. SS 1981, 1983, and 1985, and explicitly referred to plaintiff's "bargaining agent" thus implicating the collective bargaining agreement, plaintiff's belief that the case would be remanded was unreasonable, and not good cause for failure to serve the remaining defendants in the case. The plaintiff also argues that the District Court's dismissal of defendants ATSF and SFSP only applied to the original complaint, as the first amended complaint had been served by the date of the dismissal. However, this argument was raised in plaintiff's reply brief, and an appellant "cannot raise a new issue for the first time in [her] reply brief." Eberle v. City of Anaheim, 901 F.2d 814, 818 (9th Cir. 1988). Moreover, the

6Plaintiff cites Kraus v. Santa Fe Southern Pacific Corp., 878 F.2d 1193 (9th Cir. 1989), for the contention that SP's request not to serve ATSF and SFSP was in fact the request of ATSF and Santa Fe. In Kraus, this Court had recited evidence introduced at trial that all non-rail operations between SFSP and SP had been merged. However, plaintiff cites no authority for her argument that SP's request not to serve the other defendants should be attributed to the other defendants.

District Court's order dismissed the first amended complaint. Plaintiff also contends that the District Court erred by dismissing the second amended complaint, contending that the filing of the second amended complaint brought all defendants who had been previously dismissed back into the lawsuit. The plaintiff argues, "All parties who have appeared in an action remain in the action until a final judgment is rendered."

However, a final judgment was rendered on February 6, 1989, before the second amended complaint was filed on June 2, 1989.

Next, the plaintiff argues that Rule 4(j) is not applicable in removed cases, and that Rule 81(c) applies instead.7 Again, this argument was raised in plaintiff's reply brief, and issues

raised for the first time in appellant's reply brief need not be considered. Eberle, 901 F.2d at 818 (9th Cir. 1988).

Finally, plaintiff argues that the defendants ATSF and SFSP waived the Rule 4(j) objection by answering without raising objections to untimely process. Here again, plaintiff raised this issue for the first time in her reply brief. Eberle, 901 F.2d at 818 (9th Cir. 1988).

The District Court's dismissal of ATSF and SFSP was not an abuse of discretion.

7Rule 81(c) states, in relevant part: In a removed action in which the defendant has not answered, the defendant shall answer or present the other defenses or objections available under these rules within 20 days after the receipt through service or otherwise of a copy of the initial pleading setting forth the claim for relief upon which the action or proceeding is based, or within 20 days after the service of summons upon such initial pleading, then filed, or within 5 days after the filing of the petition for removal, whichever period is longest.

On appeal, defendants ATSF and SFSP have requested an award of sanctions against plaintiffs and their counsel pursuant to Rule 38, Fed.R.Civ.P. Rule 11, and 28 U.S.C. SS 1912 and 1927. This Court declines to do so.

(3) Dismissal of conspiracy claim This Court reviews de novo the dismissal of a complaint for failure to state a claim. Gobel v. Maricora County, 867 P.2d 1201, 1203 (9th Cir. 1989). Dismissal under Fed.R.Civ.P. 12(b)(6) is not appropriate "unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief".1 Conley v. Gibson, 355 U.S. 41, 45-46 78 S.Ct. 99, 2 L.ed.2d 80 (1957).

In Count 5 of the original and first amended complaint, plaintiff alleged that all defendants conspired to merge defendant SP into defendant ATSF, cease operations of PFE, and terminate plaintiff in order to avoid their "contractual and moral responsibilities" to plaintiff. On July 1, 1988, the District Court dismissed this count in the first amended complaint as to all

defendants. The Court ruled, in part:

> Insofar as a private cause of action might exist for termination due to the aborted merger, this Court concludes that it is not the proper forum for an initial determination of any claimed violation of 49 U.S.C. S 11347, which provides for employee protection in any rail carrier merger. See, Walsh v. United States, 723 F.2d 570 (7th Cir. 1983), Engelhardt v. Consolidated Rail Corp., 594 F.Supp. 1157, 1164 (N.D.N.Y. 1984).

When plaintiff filed her second amended complaint on June 2, 1989, she alleged a violation of 49 U.S.C. S 11705, stating that the Interstate Commerce Commission (ICC) had terminated its proceedings and allowed SP employees to pursue civil remedies. Plaintiff challenges the dismissal of the second amended complaint.

Defendant SFSP is a holding company formed in contemplation of the proposed merger. The holding companies of SP and ATSF had merged when defendant SFSP acquired the stock of SP in December of 1983 in an independent voting trust. When the ICC denied the proposed merger on October 10, 1986, SFSP was required to divest its interest in either SP or ATSP, and sold the

stock of SP to Rio Grande Industries. The voting trust was dissolved on October 13; 1988 when that acquisition was approved.

On February 9, 1989, the ICC concluded that it could not provide protection for those employees harmed by any actions taken in anticipation of the merger:

> [W]e do not have the authority to impose labor protection as a condition of our action disapproving a merger proposal. Section 11347 speaks in terms of approved transactions....
>
> ***
>
> If any actions adverse to employees are shown to have been ordered by [SFSP] in anticipation of consolidation and in violation of the provision of 49 U.S.C. 5 11343, which prohibits common control absent Commission approval, the adversely affected individuals have a remedy as provided by 49 U.S.C. S 11705. [SP] employees who believe they were harmed by actions take in anticipation of the proposed [SP]-ATSF consolidation would be required to show, in addition to causation, that [SFSP] exercised unlawful control of [SP], in violation of the Act or the conditions in our approval of [SFSP'S] voting trust for [SP] stock. Persons injured by a carrier violating the Act or an order of the Commission may file suit, and the carrier is liable for the damages sustained as a result of those violations. 49 U.S.C. S

> 11705. We do not think that the essentially factual matters that would be in issue in a civil proceeding are such that would require the exercise of administrative expertise, so as to invoke the doctrine of primary jurisdiction. [Citations omitted].

However, this Court has held that there is no private right of action pursuant to 49 U.S.C. S 11705 due to the exclusive jurisdiction of the ICC. In Kraus v. Santa Fe Southern Pacific Corp., 878 F.2d 1193 (9th Cir. 1989), plaintiffs had brought suit against SP, SFSP, and ATSP, stemming from plaintiffs, allegations that ATSF had induced SP to terminate plaintiffs in order to avoid post-merger liabilities which may have been imposed by the ICC. Plaintiffs alleged state law claims of tortious interference with economic relations' and a federal claim pursuant to 49 U.S.C. S 11343 for unauthorized merger or acquisition of control by ATSF over SP. This Court held:

> Neither 49 U.S.C. S 11343(a), however, nor any other provision of the subchapter governing combinations of carriers, provides for any remedy by way of a private civil damage action for violation of its provisions ... The juris-

> dictional provision upon which plaintiffs attempt to rely is contained in a separate statutory subchapter relating to the enforcement of interstate commerce laws and regulations. The precise provision relied upon is 49 U.S.C. S 11705(b)(2). which states that a carrier is "liable for damages sustained by a person as a result of an act or omission of that carrier in violation of [the ICA]8 ... [T]he subchapter of the ICA relating to mergers specifically provides that "the authority of the Interstate Commerce Commission under this subchapter is exclusive." 49 U.S.C. S 11341. Under the statutory
>
> 8The plaintiffs, recovery on this count was upheld.
>
> grant of authority over mergers, the ICC, and not the courts, has been given authority to define what constitutes an unauthorized merger or acquisition of control within the meaning of the statute.
>
> * * *
>
> We agree with [ATSF] that the provision upon which plaintiffs rely, 49 U.S.C. S 11705(b)(2) & (c)(1), authorizes court enforcement for violations of the merger provisions only after the ICC has considered whether the alleged violations have occurred.

Kraus, 878 F.2d at 1197 - 1198. There has been no finding of a violation by the ICC in this case. Further, this Court specifically rejected the contention that the February 9. 1989 ICC decision, quoted above, conferred a private

right of action. Kraus, 878 F.2d at 1198, n. 2. Thus, the District Court here properly dismissed Count 5 as to all defendants.

The defendants also argue that plaintiff's claim of conspiracy is preempted by the RLA as a "minor dispute". Because this Court has clearly held that there is no private right of action pursuant to S 11705; it is unnecessary to reach this issue.

(4) Dismissal of plaintiff's claim for intentional infliction of emotional distress

The dismissal of a claim is reviewed de novo. Gobel, 867 F.2d at 1203.

On July 1. 1988, the District Court dismissed Count 7 of plaintiff's complaint alleging intentional infliction of emotional distress. The Court correctly held that claims for emotional distress arising from termination are subject to mandatory arbitration under the RLA. Lewy, 799 F.2d at 1290 ("We have consistently held that the RLA preempts state tort claims by employees against railroads for wrongful discharge or for intentional infliction of emotional distress,

where the alleged tortious activity is "arguably" governed by the collective bargaining agreement or has a "not obviously insubstantial" relationship to the labor contract, and where the "gravamen of the complaint is wrongful discharge"); Stallcop, 820 F.2d at 1049, citing Carter v. Smith Food King, 765 F.2d 916, 921 (9th Cir. 1985); Olguin, 740 F.2d at 1475-76; Tellez v. Pacific Gas & Electric, 817 F.2d 536# 539 (9th Cir. 1987) (actions for intentional and negligent infliction of emotional distress not preempted since they arose from conduct not covered by the collective bargaining agreement); Magnuson v. Burlington Northern. Inc., 576 F.2d at 1367.

(5) Denial of Plaintiff's request for additional discovery time

The plaintiff next claims that the District Court was in error by failing to allow more time for discovery. This Court reviews a denial of discovery for abuse of discretion. Brae Transp., Inc. v. Coopers & Lybrand, 790 F.2d 1439; 1442 (9th Cir. 1986), citing Foster v. Arcata Associ-

ates, Inc., 772 F.2d 1453, 1467 (9th Cir. 1985). cert. denied, 475 U.S. 1048, 106 S.Ct. 1267, 89 L.ed.2d 576 (1986).

Pursuant to Fed.R.Civ.P. Rule 56(f), a court may refuse an application for summary judgment or may continue a matter for further discovery if a party opposing a motion "cannot for reasons stated present by affidavit facts essential to justify the party's opposition." Plaintiff's counsel submitted an affidavit in opposition to the motions for summary judgment in which he averred that he had been unable to resolve discovery disputes with the defendants. He stated that the union cancelled the depositions of two union officials, and the continuance of the depositions was granted by a magistrate; the date then set for the deposition was cancelled due to plaintiff's counsel's trial schedule, and the union had not been cooperative in resetting the date.

The Union provided the declaration of Kathleen S. King, counsel for the Union, in reply to the plaintiff's opposition to summary judgment,

stating that the Union had cooperated with all discovery requests; further, the Union had been willing to produce Union officials for deposition but plaintiff's counsel did not attempt to reschedule until the date on which defendants filed motions for summary judgment. Plaintiff's counsel also did not take the deposition of either Tom Ellen or Rick Fend, PFE officials whom plaintiff claims were instrumental in the discriminatory actions.

At the hearing on February 2, 1989, plaintiff's counsel asked the District Court for more time to take the depositions of the Union officials. The Court took the matter under advisement, and in the February 6, 1989 order, the Court held that the plaintiff had had ample time for discovery.

Given the plaintiff's dilatory efforts at discovery and because the plaintiff has not indicated what facts this discovery was expected to show, Volk v. D.A. Lavidson a Co., 816 F.2d 1406, 1416 (9th Cir. 1987), the District Court did not abuse its discretion in denying the

request for further discovery.

(6) Defendants SP's and PFE'S motion for summary judgment

On February 6, 1989, the District Court granted defendants SP's and PFE'S motion for summary judgment on Count 4 and Count 6.

This Court reviews the District Court's grant of summary judgment de novo. Miller v. Fairchild Industries, Inc., 797 F.2d 727 (9th Cir. 1986), appeal after remand, 876 F.2d 718, opinion amended, 885 F.2d 498 (1989), cert. denied U.S. 110 S.Ct. 1524, 108 L.ed.2d 764 (1990). This Court must determine whether there are any genuine issues of material fact, viewing the evidence in the light most favorable to the moving party, and whether the District Court correctly applied the law. Ashton v.Cory, 780 F. 2d 816, 818 (9th Cir. 1986).

To establish a prima facie discrimination claim, plaintiff must show that she is (1) a member of a protected group; (2) her job performance was satisfactory; (3) she was discharged from her position; and (4) others not in the protected

class were retained by defendants. McDonald v. Santa Fe Trail Transportation@o., 427 U.S. 273, 96 S.Ct. 2574, 49 L.ed.2d 493 (1976). The burden then shifts to the defendants to articulate a legitimate nondiscriminatory reason for the action. If that burden is sustained, the burden then shifts back to the plaintiff to establish pretext by showing either that a discriminatory reason more likely than not motivated the employer or that the employer's explanation is unworthy of credence. Perez v. Curcio, 841 F.2d 255, 257 (9th Cir. 1988). citing Texas Dep't of Community Affairs v. Burdine, 450 U.S. 2481 256, 101 S.Ct. 1089, 1095, 67 L.ed.2d 207 (1981).

The District Court held that the plaintiff had established a prima facie case of discrimination, finding that plaintiff is a member of three protected groups, her job performance was satisfactory since several of her superiors rated her work as exceptional, she was discharged, and other employees who-were not Asian, or over 40 were transferred to positions at SP that the plaintiff was qualified to perform.

Defendants challenge the District Court's finding that the plaintiff was eligible for transfer, but our disposition makes it unnecessary for us to rule on that point.

Second, the Court held that the defendants had rebutted the presumption of discrimination. The Court found that the defendants had offered "substantial" proof supporting their contention that Sieu Mei was furloughed for economic reasons. PFE had experienced a severe decline in business due to increased competition from the trucking industry prior to the 1985 merger., The Court further pointed out that other employees who were not members of a protected class were also not transferred to SP.

The District Court then found that the plaintiff had not presented evidence which raised a genuine issue of fact challenging defendants' explanation of plaintiff's termination.

Plaintiff challenges the District Court's finding that the defendants had demonstrated a non-discriminatory reason for her termination. First, she argues that the defendants are

estopped from arguing that her termination was a result of PFE'S economic decline due to representations contained in the alleged "common law agreement". The December 18, 1978 letter stated that plaintiff's position was permanent and "fully protected" under the union contract so that if the company did not have a job for her, she would continue to be paid and gain retirement benefits. She also argues that the decline in business clause does not apply to her due to the date at which she started working.

These arguments essentially restate the plaintiff's claim for wrongful termination. In order to find that defendants were "estopped" from asserting that plaintiff was fired due to economic reasons, this Court would have to interpret the collective bargaining agreement and resolve the wrongful termination claims on the merits. The plaintiff has not appealed the dismissal of the wrongful termination claims, and they are in any event subject to mandatory arbitration under the RLA.

Moreover, defendants submitted substantial evid-

ence to support their contention that PFE was experiencing economic problems. Tom Ellen, former General Manager of PFE, submitted a declaration regarding his knowledge of the economic pressures created by deregulation, competition from the trucking industry, and a large wage increase awarded to the union. Under California law, reduction of work force necessitated by economic circumstances constitutes good cause for dismissal. Gianaculas v. Trans World Airlines, Inc., 761 P.2d 1391 (9th Cir. 1985).

Richard Fend, Assistant Controller of PFE at the time the company was absorbed by the parent company, submitted a declaration stating that he was responsible for deciding which positions would be transferred to SP, and made that decision based on the job duties of a particular position not the identity of the employee holding that position. He attached exhibits detailing which of the 16 clerks at PFE were furloughed and/or transferred to SP, which information was obtained from the company personnel files. Fifteen of the PFE clerks were over age

40; nine of these were transferred. Of the seven female clerks, four were transferred. of the two Asian clerks, one was transferred to SP. Fend avers, 'Ms. Tu was not transferred because, at the time, she was performing miscellaneous or general clerk functions almost all of which ceased to exist after October 1, 1985.1 The plaintiff did not depose either Ellen or Fend. The District Court reasonably found that the defendants had asserted legitimate, nondiscriminatory reasons for plaintiff's termination.

The plaintiff also challenges the District Court's finding that she did not present evidence rebutting defendants, explanation. However, little of plaintiff's evidence is admissible. Plaintiff asserts in her 'Declaration in Opposition to Motion for Summary Judgement [sic]', that the work conditions were made intolerable so that she would voluntarily leave and that she was moved to positions that were designed to be terminated so that she would not receive job protection. These assertions have no foundation and are not within her personal know-

ledge. Plaintiff's allegations of sexual jokes contain no citation to the record.

Plaintiff testified in her deposition regarding friction with the management over expense reports; i.e. the plaintiff's manager, Rick Fend, was angry when she questioned his expense reports. She also testified that Walsh told her that she was fired because Rick Fend and Edna Clark (whose role is unclear) did not like her and that another supervisor stated that she had trouble with Fend. This testimony is inadmissible hearsay and fails to relate to plaintiff's claims of discrimination based on sex, race, or age. Defendants also argue that these discovery materials were not presented to the trial court, a fact which plaintiff does not contest. Daly-murphy v. Winston, 837 F.2d 348, 351 (9th Cir. 1988) (the reviewing court will normally not supplement the record on appeal with material not considered by the trial court).

In her deposition plaintiff also testified to derogatory remarks made about Chinese persons: Mr. Walsh, one of her supervisors, once stated

that 'pretty soon the Chinese would own San Francisco.' Another time when the plaintiff had trouble working a new phone system, Rick Fend stated, 'You can't talk English. You can't even push the button.' The plaintiff testified that Fend made numerous remarks about Chinese, although she could not remember other comments. She also could not remember if any other employees made racially derogatory remarks to her. In Stallcop, supra, the plaintiff cited her supervisor's statement that she "did not know the English language" as proof of discriminatory conduct. The Court held, "derogatory ethnic statements, unless excessive and opprobrious, are insufficient to establish a case of national origin discrimination." Stallcop 820 F.2d at 1050-51. The derogatory statements cited in this case are also not excessive and opprobrious. Also, the defendants assert that this deposition-material was not presented to the District Court.

Although plaintiff claims that PFE intentionally caused its economic decline, her only evidence is her declaration that she was told

not to answer the phone because PFE did not want the business.

The District Court did not err by holding that plaintiff had failed to demonstrate the existence of specific facts showing there is a genuine factual issue that defendants, reason for her termination was pretextual.

Plaintiff also claims that SP's failure to rehire her is retaliatory discrimination for bringing this lawsuit. This claim was not alleged in either the initial compliant or the first amended complaint2 the plaintiff does not address the

9.Plaintiff argues that the retaliatory discrimination claim was explicitly alleged in the second amended complaint; however, this complaint was filed after the District Court defendants, motion for summary judgment.

applicability of the exceptions to the general rule against considering issues for the first time on appeal. Javanovich, 813 P.2d at 1037, citing Bolker, 760 F.2d at 1042. Thus, this issue will not be considered.

(7) Union's motion for summary judgment

Whether a union has breached its duty of fair representation is a mixed question of law and fact which this Court reviews de novo. Galindo v. Stoody Co., 793 F.2d 1502; 1513 (9th Cir. 1986). citing United States v. McConney, 728 F.2d 1195, 1204 (9th Cir.) (en banc), cert. denied, 469 U.S. 824, 105 S.Ct. 101, 83 L.Ed.2d 46 (1984); see also Johnson v. United States Postal Service, 756 F.2d [illegible].51, 1465 (9th Cir. 1985) (applying de novo standard to "ultimate findings"); but see Robesky v. Oantas Emipire Airways Ltd. 573 F.2d 1082, 1091 (9th Cir. 1978) (suggesting issue is a question for the trier of fact).

On August 14,, 1989, the Court granted the defendant Union's motion for summary judgment, holding that plaintiff had made no eviden-

tiary showing that the Union's actions were discriminatory or in bad faith and that the Union had adhered to established procedures for handling grievances.

To establish a breach of fair representation, the plaintiff must show that the Union's conduct was "arbitrary, discriminatory, or in bad faith."1 Galindo, 793 F.2d at 1513, citing Vaca v. Sipes, 386 U.S. 171, 190, 87 S.Ct. 903, 916, 17 L.ed.2d 842 (1967). Union decisions regarding the handling of grievances are afforded wide latitude, and "a union's conduct may not be deemed arbitrary simply because of an error in evaluating the merits of a grievance... or in presenting the grievance at an arbitration hearing."1 Galindo, 793 P.2d at 1515, citing Peterson v. Kennedy, 771 F.2d 1244 (9th Cir. 1985), cert. denied, 475 U.S. 1122, 106 S.Ct. 1642, 90 L.ed.2d 187 (1986) (emphasis added by Galindo author).

In Galindo, this Court found that the Union representative's failure to bring up an issue at arbitration reflected a judgmental

decision. Similarly here, the Union's failure to address the plaintiff's individual considerations -- her claims that she was exempt from the decline in business clause of the collective bargaining agreement and her claims of discrimination based on sex., race, and age -- reflect a judgmental decision. As in Galindo, "this representation was, at worst, negligent." Galindo, 793 F.2d at 1515. Negligent conduct may only be the basis of a fair representation claim when "the individual interest at stake is strong and the union's failure to perform a ministerial act completely extinguishes the employee's right to pursue his claim." Dutrisac v. Caterpillar Tractor Co, 749 P.2d 1270, 1274 (9th Cir. 1983) (emphasis added). The Union's conduct in question here was not ministerial.

In order to recover for a breach of fair representation, the plaintiff must also establish the underlying grievance had merit. Skillsky v. Lucky Stars, Inc., 893 F.2d 1088 (9th Cir. 1990). As discussed above, the plaintiff did not introduce evidence to support her

claim of discrimination. In addition, plaintiff has not introduced specific evidence to support her claim that the decline in business clause did not apply to her. This Court has only the language of the decline in business clause to evaluate: "the provisions of this section will not apply to Pacific Lines employees in the San Francisco General Offices with seniority dates of March 16, 1963 or earlier." On its face, this applies only to certain [SP] employees of Pacific Lines working in the San Francisco office, whereas the plaintiff was an employee of PFE working in Brisbane, California at the time of the termination. Moreover, the plaintiff introduced no evidence that there was a conflict of interest by the Union which resulted in its failure to effectively represent plaintiff.10

The District Court did not err in granting summary judgment to the Union.

(8) The cross-appeal

On February 6. 1989, the District Court ruled that plaintiff's breach of fair represen-

tation claim against the defendant Union was barred by the six month statute of limitations in section 10(b) of the National Labor Relations Act. The Court later reconsidered and reversed its previous ruling that the plaintiff's claim was barred, concluding that the limitations period did not begin to run until the plaintiff was informed of the arbitrator's decision. The Union cross-appeals this issue. However, since the District Court properly granted

10. Plaintiff references only counsel's statements during plaintiff's deposition and at hearing.

summary judgment to the Union on plaintiff's breach of fair representation claim, it is not necessary for this Court to decide the cross appeal, and it will be dismissed as protective.

CONCLUSION

In summary, the District Court properly denied the plaintiff's motion to remand since her claims were arguably governed by the collective bargaining agreement and she alleged violations of 42 U.S.C. SS 1981, 1983, and 1985. Sec-

tions of 42 U.S.C. SS 1981, 1983, and 1985. Second, the District Court properly dismissed defendants ATSF and SFSP for plaintiff's failure to timely serve under Fed.R.Civ.P. Rule 4(j). The District Court also did not err in dismissing Count 5, alleging conspiracy, since there is no private right of action pursuant to 49 U.S.C. 5 11705. Further, the plaintiff's claim for intentional infliction of emotional distress was properly dismissed as a "minor dispute" subject to mandatory arbitration. The District Court did not err in not allowing the plaintiff more time for discovery, and properly granted summary judgment to defendants SP and PFE. Plaintiff failed to demonstrate the existence of specific facto showing a genuine factual issue that defendants, claims of economic decline were pretextual.

In addition, this Court need not decide the cross appeal because the District Court properly granted summary judgment to the Union on plaintiff's breach of fair representation claim. The cross appeal will therefore be dismissed as

protective.

Finally, this Court declines to award defendants ATSF and SFSP an award of sanctions against plaintiffs and their counsel. APPEAL NO. 89-16186 AFFIRMED; CROSS-APPEAL NO. 89-16292 DISMISSED. Costs in favor of appellees.

NOT FOR PUBLICATION IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

FILED
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CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

SIEU MEI TU AND JOSEPH Z. TU,

Plaintiffs-appellants,

V. CA No. 89 -16186

SOUTHERN PACIFIC TRANSPORTATION COMPANY; ATCHISON, TOPEKA, SANTA FE RAILROAD COMPANY ET AL.,

ORDER

Defendants-appellees.

BEFORE: CANBY AND KOZINSKI, CIRCUIT JUDGES and CARROLL, DISTRICT JUDGE.

The panel has reviewed the petition for rehearing and suggestion for rehearing en banc, and has determined that it is without merit. Further, by his own admission, appellants' lawyer knew of this court's memorandum disposition on June 26 and failed to file a motion to recall the mandate in a timely fashion.

ORDERED motion to recall the mandate denied.

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9 Attorneys for Defendants
Filed Oct 9 1987
10
11 UNITED STATES DISTRICT COURT
12 NORTHERN DISTRICT OF CALIFORNIA
13
14 SIEU MEI TU AND JOSEPH TU, No. C87-1198-DLJ
Plaintiffs,
15 ORDER DENYING MOTION TO REMAND
16 v
17 SOUTHERN PACIFIC TRANSPORTATION COMPANY,
18 et al.
19 Defendants.
20
21 The matter, having come for hearing on Plaintiffs' Motion to Remand, and the Court having considered Plaintiffs' moving papers, Defendants Pacific Fruit Express Company and
24 Southern Pacific Transportation Company's opposing papers,
25 declarations of counsel, pleadings on file, and oral argument,
26 hereby ORDERS as follows:
27 1. Plaintiffs' Motion to Remand is denied.

2. At all relevant times herein, Plaintiff

was a member of a union whose terms and conditions of employment were
3 governed by a collective bargaining agreement negotiated
4 pursuant to the Railway Labor Act. Any claim that an indi-
5 vidual has been wrongly terminated or transferred implicates
6 the collective bargaining agreement and thus raises a federal
7 question.
8 Good cause appearing, it is hereby ordered that the
9 Motion to Remand is denied.
10 D. LOWEll JENSEN
11 DATED: Oct 9, 1987.
The Hon. D. Lowell Jensen
Judge of the United States District Court

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SIEU MEI TU AND JOSEPH Z. TU

Plaintiffs,

V.

SOUTHERN PACIFIC TRANSPORTATION COMPANY, et al.,

Defendants.

FILED

APRIL 6, 1988

C 87 1198 DLJ

ORDER

Defendants brought this motion on April 6, 1988 to dismiss, or in the alternative, for summary judgment. For the following reasons, this Court grants the motion to dismiss with leave to amend.

Plaintiff originally brought this wrongful termination lawsuit in state court, alleging that defendants fired her in violation of a promise of full employment or salary until she

17 turned 65. Defendants properly removed to federal court on the

18 grounds of federal preemption. In September 1987, this Court

19 denied plaintiff's motion to remand, finding that the complaint

20 implicated a collective bargaining agreement covered by the

21 Railway Labor Act, 45 U.S.C. %151 et seq..

22 The Railway Labor Act establishes that any "'minor

23 disputes" must be referred to the National Railroad Adjustment

24 Board for final and binding arbitration. 45 U.S.C. SS 153,

25 v. Southern Pacific Co., 799 F.2d 1282, 1290 (9th Cir.

26 1986). 'Wrongful termination is deemed to be a "minor dispute".

27 Id

Accordingly, on its face, plaintiffs' first and second

2 causes of action, for wrongful

termination, establish a claim

3 which must be referred to the National Railroad Adjustment

4 Board final and binding arbitration.

5 Plaintiffs' fourth and fifth causes of action, for

6 discrimination and loss of consortium, are pendent state

7 claims. This Court declines to exercise its pendent

8 jurisdiction.

9 Accordingly, this Court GRANTS defendants' motion to dismiss. Plaintiffs are granted leave to amend the complaint to state a federal cause of action. Such amendment must be

12 filed with the Court within thirty (30) days of this Order.

13 IT IS SO ORDERED.

Dated: April 6.1988.

15 D. Lowell Jensen
16 United States District Judge

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SIEU MEI TU and JOSEPH Z. TU, FILED

Plaintiffs,, JUNE 30, 1988

V. C 87 1198 DIJ

SOUTHERN PACIFIC TRANSPORTATION, ORDER et al.,

Defendants.

Defendants brought this motion to dismiss the First Amended Complaint. For the following reasons, this Court grants defendant's motion to dismiss the first, second, third, fifth, and seventh causes of action. Defendants The Atchison, Topeka and Santa Fe Railway Company and Santa Fe Southern Pacific corporation are dismissed from all causes of action

pursuant to Fed. R. Civ. P. 4(j). Defendant Southern Pacific Transportation Company is dismissed from the eighth cause of action. Finally, this Court vacates its April 6, 1988 Order as, to the issue of pendent jurisdiction, and will exercise pendent jurisdiction over the fourth and sixth causes of action.

1. The first, second and third causes of action

In its April 6, 1988 Order, this Court held that plaintiff's causes of action for wrongful termination state a claim which must be referred to the National Railroad Adjustment Board for final and binding arbitration, pursuant to the Railway Labor Act. This Court granted plaintiff leave to amend to state a federal cause of action.

The amended first, second, and third causes of action still fail to state a cause of action which cause of action which would give this Court jurisdiction over plaintiff's claim for wrongful termination. See, 45 U.S.C. SS 153, Lewy v. Southern Pacific Transp. Co, 799 F.2d 1281, 1290 (9th Cir. 1986). Accordingly, these claims are dismissed with prejudice.

2.The fifth cause of action

In the fifth cause of action, plaintiff alleges that the defendant railroads conspired to merge, to cease the operation of Pacific Fruit Express, and therefore to terminate plaintiff. Absent more, the merger of two companies does not give rise to a private federal or state action. Insofar as a private state action might exist for

17 termination due to the aborted merger, this Court concludes
18 that it is not the proper forum for an initial determination of this matter. The Interstate Commerce Commission is the
20 appropriate agency for an initial determination of any claimed
21 violation of 49 U.S.C. SS 11347, which provides for employee
22 protection in any rail carrier merger. See, Walsh v. United -
23 States, 723 F.2d 570 (7th Cir. 1983), Engelhardt v.
24 Consolidated Rail Corp., 594 F.Supp 1157, 1164 (N.D.N.Y. 1984).
25 Accordingly, the fifth cause of action is dismissed with
26 prejudice.
2 3. The fourth and sixth causes of action
3 Plaintiff's fourth cause of action purports to state a
4 claim for wrongful discharge in violation of the fundamental

principles of public policy of the United States of America and the State of California... in that said termination was based on discrimination against plaintiff... First Amended Complaint, P. 10, p31.

This claim does not state a federal statutory claim for age or sex discrimination, nor a claim for employment discrimination under California law. In its April 6, 1988 Order, this Court construed this claim as a pendent state claim for discrimination. While the pleading is scarcely the model of clarity, the Court will continue to construe this claim as a state claim for discrimination, and will exercise its pendent jurisdiction.

The April 6, 1988 order, insofar as it declined the

exercise of pendent jurisdiction over the fourth, and seventh cause of action, is hereby vacated.

4. The seventh-cause of action

Plaintiff's seventh cause of action states a claim for the, infliction of emotional distress. This claim is preempted by federal labor law, since plaintiff's alleged emotional distress arises out of conduct covered by the collective bargaining agreement. Truex v. Garrett, 784 F.2d 1347, 1351 (9th Cir. 26 1985).

The Ninth Circuit has specifically held that emotional distress claims arising out of termination and brought by railway workers covered by the Railway Labor Act must be submitted to grievance and arbitration Lewy v. Southern Pacific Transportation Company, 799 F.2d 1281, 1291 (9th Cir. 1986).

Accordingly, the seventh cause of action is

dismissed.

5. The eighth-cause of action

The eighth cause of action purports to state a claim for breach of the duty of fair representation. Plaintiff cannot state a claim against defendant railroads for breach of this duty, but only against the Union, the Brotherhood of Railway, Airline and Steamship Clerks.

Accordingly, this claim is dismissed against the defendant railroads.

6. Defendants Santa Fe and Railway

Plaintiff's complaint was filed in state court on September 26, 1986 and properly removed to this Court by defendant Southern Pacific Transportation Company on March 20, 1987. Plaintiffs did not effectuate service in 1987 on defendants Santa Fe and Railway until Decem-

ber 8, 1987. Thus, plaintiffs
21 failed to serve these defendants within the 120-day time period, prescribed by Fed. R. Civ. P. 4(j).
23 Dismissal pursuant to 4(j) is mandatory absent a showing
24 of good cause. Wei v. State of Hawaii, 763 F.2d 370, 372 (9th
25 Cir. 1987). Plaintiff has been unable to demonstrate any good
26, cause for failure to serve these defendants.

Thus, defendants Santa Fe and Railway are dismissed from
2 all causes of action.
3
4 Accordingly,
5 The first, second, third, fifth, and seventh causes of action are DISMISSED with prejudice;
6
7 This Court will exercise its pendent jurisdiction over the
8 fourth and sixth claims;
9 The defendant railroads are DISMISSED from the

eighth cause of action;

Defendants Santa Fe and Railway are DISMISSED from all causes of action.

A status conference will be held on Wednesday, 14 September 7, 1988 at 9 a.m..

IT IS SO ORDERED.

Dated: June 30, 1988.

Lowell Jensen

United States District Judge

FILED

FEB 06 1989

WILLIAM L WITTAKER CLERK.

U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

3 SIEU MEI TU and JOSEPH TU,

4 Plaintiffs,

5 v C87-1198-DLJ

6, ORDER GRANTING DEFENDANTS' SOUTHERN PACIFIC TRANSPORTATION MOTIONS FOR SUMMARY COMPANY, et. al., JUDGMENT AND DENYING

7 DEFENDANTS' MOTION TO

8 DISQUALIFY

9

10

11 The Court heard defendants' Motions for Summary Judgment

12 and for Disqualification on February 2, 1989. Appearing for

13 plaintiffs Sieu Mei Tu and Joseph Tu was Lee J. Kubby.

14, Appearing on behalf of defendant Southern

Pacific and Pacific

15 Fruit Express was Kevin P. Block. Appearing for the Union

16 defendants were James M. Darby and Kathleen S. King.

17 Plaintiff Sieu Mei Tu is a sixty-two year old asian

18 female. Plaintiff claims that her employment with defendant

19 Pacific Fruit Express ("PFE") was terminated because of her

20 age, sex and race in violation of the California Fair

21 Employment and Housing Act ("FEHA"). Cal. Gov.code SSSS 12900-

22 12993 (1980). Plaintiffs also contend that they have suffered

23 a loss of consortium as a result of defendants' actions. Finally, plaintiffs claim that the defendant unions breached

24 their duty of fair representation under federal labor law.

25

After reviewing the briefs submitted by the parties, the arguments of counsel and the applicable law, the Court hereby

GRANTS defendants' Motions for Summary Judgment.

Also before the Court is defendants' Motion for Disqualification of plaintiffs' counsel. This motion is based on defendants' contention that plaintiffs' counsel engaged in unethical conduct by communicating, ex parte, with an employee of Southern Pacific regarding this litigation. Based on the representations made by Mr. Kubby during oral argument that no such communication occurred, the Court hereby DENIES defendants' Motion for Disqualification.

I.

Under Rule 56(c) of the Federal Rules of Civil Procedure,

summary judgment may be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issues as to any material fact and that the party is entitled to a judgment as a matter of law."

In a motion for summary judgment, the Supreme Court has , held that the moving party has the "burden of showing the absence of material fact." Adickes v. S.H. Adickes v. S.H. Kress and Co., 90 S.Ct. 1598, 1608 (1970). However, the Court has also stated that summary judgment could issue "after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence

of an element
24 essential to that party's case, and on which that party will
25 bear the burden of proof at trial." Celotex Corp. v. Catrett, 26 106 S.Ct. 2548, 2552-54 (1986).

The Court finds that there is not a genuine issue regarding the following material facts in this action.

2

3 Plaintiff Sieu Mei was furloughed from her position as an
4 accountant with defendant PFE when it merged with defendant Southern Pacific ("SP"), its parent corporation, during a
6 reorganization of SP in 1985. This reorganization was the
7 result of economic hardships suffered by PFE due to increased
8 competition in the transportation industry.
9 There were 16 clerical employees at PFE at the time of
10 the merger. Prior to the reorganization, PFE

and SP
management determined that PFE employees in those positions
that would not be required at SP after the merger would be
furloughed and those employees in the remaining positions
would be transferred to SP. Out of the 16 clerical positions
on the "seniority district one" roster at PFE, 7 were
furloughed and 9 were transferred to SP. Within this group of
16 PFE employees, there were 15 clerks over the age of 40, 7
female clerks and 2 asian american employees. Following the
merger, defendants transferred 9 of the 15 clerks over the age
of 40, 4 of the 7 female clerks, and 1 of the 2 asian american
employees to positions at SP. Defendants have interviewed

Sieu Mei since furloughing her, but she has not been rehired.

II

To state a prima facie case under the FELA for intentional discrimination, plaintiff must show that:

(1) she belongs to a protected group;

(2) her job performance was satisfactory;

(3) she was discharged from her position:

(4) others not in the protected class were retained by defendants.

Mixon v. Fair Employment a Housing Employment & Housing Commission, 192 Cal.App.3d 1306, 1318 (1987)(citing McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273 (1976)).

After the initial prima facie case is presented by plaintiff, defendants are given an opportun-

ity to rebut plaintiff's case by showing that there was a legitimate reason
12 for dismissal. Id. at 1317. "The defendant need not persuade
13 the court that it was actually motivated by the proffered
14 reasons. It is sufficient proffered 14 reasons. It is sufficient if the defendant's evidence raises
15 a genuine issue of fact as to whether it discriminated against
16 the plaintiff."
Id. at 1318 (quoting Texas Dept. of Community 17 Affairs v. Burdine, 450 U.S. 248, 254 (1981)). The Ninth Circuit has held that economic hardship is a sufficient reason to terminate an employee. Gianaculas son to terminate an employee. Gianaculas v. Trans World Airlines, 20 Inc., 761 F.2d 1319, 1395 (9th Cir. 1985); Clutterham 1395 (9th Cir. 1985); Clutterham v. 21 Coachmen Industries, Inc., 169 Cal.App.3d 1223, 1227, 215
22 Cal.Rptr. 795 (1985).

If a defendant succeeds in creating a genuine issue of material fact concerning the reason for dismissing an employee, the burden of proof then shifts an employee, the burden of proof then shifts back to the plaintiff to prove "that the proffered reason was not the true reason for the employment decision." Id. A plaintiff may accomplish this either directly by "persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." Id. at 1318-19. (citing Burdine, 450 U.S. at 256).

In the present case, plaintiff Sieu Mei has stated a prima facie case of discrimination. She is a

member of three
9 protected groups. Her job performance prior to her dismissal
10 was at the very least satisfactory, and several of her
11 superiors rated her work as exceptional. She was furloughed
12 instead of being transferred to SP in 1985. Other employees
13 who were not over 40, female, or asian, were transferred into
14 positions at SP that Sieu Mei was qualified to perform. Thus,
15 a prima facie a prima facie showing of intentional discrimination has been
16 made by plaintiffs.
17 Defendants have rebutted the presumption of
18 discrimination created by plaintiffs' initial showing by
19 offering substantial proof supporting their contention that
20 Sieu Mei was furloughed for economic reasons. PFE had

experienced a severe decline in business due to increased competition from the trucking industry prior to the 1985 merger. Defendants assert that Sieu Mei was not transferred to SP because the position she was in at PFE was not needed at SP. Defendants provided the Court with sufficient evidence to create a genuine issue of material fact as to whether intentional discrimination motivated the decision to furlough plaintiff. This position is supported by the fact that other employees who are not members of a protected class were also not transferred to SP following the merger. Accordingly, defendants have satisfied their burden of rebutting plaintiffs' prima facie case of discrimina-

tion.

Plaintiffs have failed to present evidence which raises a genuine issue related to defendants' factual showing of economic hardship. Although plaintiffs assert that PFE intentionally turned away business prior to the merger to the merger in order to facilitate the combination of SP and PFE, the evidentiary showing necessary to support this assertion is clearly insufficient. After ample time for discovery has passed, plaintiffs have not presented the Court with evidence sufficient to overcome defendants' justification for their actions. Thus, plaintiffs have not met their overall burden and have not stated a valid claim for intentional discrimination against SP and PFE.

III

Plaintiffs' state tort claim for loss of consortium claim is dependent upon the validity of the underlying discrimination action. Santigo v. Employees Benefits Services, 168 Cal.App.3d 898, 906, 241 Cal.Rptr. 679 (1985). Because plaintiffs have failed to state a claim for discrimination, summary adjudication of this claim is also appropriate.

Accordingly, defendants' Motion for Summary Judgment is also GRANTED for plaintiffs' loss of consortium claim.

IV.

Plaintiffs claim against the defendant Unions alleges that Union representatives breached their duty of fair representation under section 301 of the

National Labor 6 Relations Act, 29 U.S.C. SSSS 151-188 (1984), by not fully

7 prosecuting plaintiff Sieu Mei's grievance against PFE.

8 Claims for breach of a union's duty of fair representation

9 under section 301 are subject to a six month

10 statute of limitations. Delcostello v. International Brotherhood of Teamsters,

462 U.S. 151 (1983). This statute

12 of limitations begins to run when "an employee knows when "an employee knows or should

13 know of the alleged breach of the duty of fair breach of the duty of fair

14 representation." Galindo v. Stoody Co., 793 F.2d 1502, 1503 (9th Cir. 1986).

16 This cause of action was filed in April of 1988.

17 Plaintiffs and their attorney were aware of the procedures

18 being followed by the Union defendants to prosecute plaintiffs' grievance in 1986.

Plaintiffs' counsel admitted

knowledge of the acts alleged to constitute a breach of
defendants' duty in a letter dated January 20, 1986,
threatening to sue defendants for breach of their duty.
Therefore, because the six month statute of limitations had
expired prior to the filing of this claim, defendant Unions'
Motion for Summary Judgment of plaintiffs' claim under section
301 is GRANTED.
Therefore, defendants' Motions for Summary Judgment are
hereby GRANTED as to plaintiffs' claims for discrimination,
loss of consortium and breach of the duty of fair
representation and breach of the duty of fair
Defendants Motion for Disqualification is
hereby DENIED.
IT IS SO ORDERED.

DATED: February 06, 1989.

D. Lowell Jensen

United States District Judge

F I L E D

UNITED STATES DISTRICT COURT

FEB 0 6 1989

2 NORTHERN DISTRICT OF CALIFORNIA

WILLIAM L. WHITTAKER CLERK.

U.S. DISTRICT COUNT

3 SIEU MEI TU AND JOSEPH TU

4

Plaintiffs,

5 V. C87-1198-DLJ

6 SOUTHERN PACIFIC TRANSPORTATION CO., et al.,

8 Defendants.

For the reasons stated in the order signed on this date, this court enters JUDGMENT in favor of defendants.

IT IS SO ORDERED.

DATED: February 6, 1989

14 D. Lowell Jensen

16 United States District Judge

F I L E D

May 3, 1989 UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SIEU MEI TU and JOSEPH TU, C-87-1198 DLJ

Plaintiffs, ORDER

v

SOUTHERN PACIFIC TRANSPORTATION COMPANY, et al.

Defendants.

On April 12, 1989, this Court heard plaintiffs' motion for reconsideration of the order granting summary judgment to defendants. Lee Kubby appeared for plaintiffs. Wayne M. Bolio appeared for defendant Southern Pacific. James Darby and Kathleen King appeared for defendant Union. For the following reasons, the Court DENIES plaintiffs' motion for reconsideration as to defendant Southern

Pacific, and GRANTS

17 plaintiffs' motion for reconsideration as to defendant Union.

18

19 RECONSIDERATION OF ORDER GRANTING SUMMARY JUDGMENT

20 FOR DEFENDANT SOUTHERN PACIFIC

21 In its earlier Order, the Court granted summary judgment

22 to defendant Southern Pacific on grounds that while plaintiffs

23 had established a prima facie case of discrimination, Southern

24 Pacific had rebutted this showing by evidence of a legitimate economic reason for the dismissal, and that the plaintiffs had

26 not provided evidence which would meet their overall burden of

27 showing intentional discrimination.

28 In their motion for reconsideration, plaintiffs'

2 principal argument is that Mrs. Tu had a contractual right

to continued employment. On this basis, plaintiffs' contend that defendant's stated reason for Mrs. Tu's dismissal, economic hardship, is false. However, this same argument was raised in plaintiffs' opposition to summary judgment papers. This argument was considered and rejected by the Court in reaching its order granting summary judgment for defendant Southern Pacific.

The Ninth Circuit set out the standard of review for a motion for reconsideration of a summary judgment order in Backlund v. Barnhart, 778 F.2d 1386 (9th Cir. 1985). The court held that a motion for reconsideration of a summary judgment motion should be denied if it presents no arguments

that have not already been raised in opposition to summary judgment. Id. at 1388.

Under the rule established in Backlund, this Court DENIES plaintiffs' motion as to defendant Southern Pacific because plaintiffs' motion fails to raise any new arguments, facts, or allegations, not previously raised in opposition to summary judgment.

Although plaintiffs cite a number of rules from the Federal Rules of Civil Procedure in support of their motion, a motion for reconsideration of summary judgment is appropriately brought under Rule 59(e).

RECONSIDERATION OF THE ORDER GRANTING SUMMARY JUDGMENT FOR THE UNION DEFENDANT

In its Order granting summary judgment to defendant Union, the Court determined that the plaintiff had knowledge of the Union's alleged lack of fair representation in January 1986. Plaintiffs did not name the Union as a defendant until April 1988. The Court found plaintiffs' claim time-barred by the six month statute of limitations established by the Supreme Court in Delcostello v. International Brotherhood of Teamsters, 462 U.S. 151, 172 (1983) for fair representation actions. on grounds that the statute of limitations had run on plaintiffs' claim, the Court granted summary judgment for defendant Union.

On January 20, 1986, plaintiffs' counsel sent a letter to the Union requesting action on Mrs. Tu's

behalf. On
16 January 28, 1986, in response, the Union sent a letter to
17 Mrs. Tu, informing her that it would proceed with her claim
18 through the grievance process. On November 30, 1987, the
19 arbitration board denied the Union's claim on behalf of Mrs.
20 Tu. On January 4, 1988, the Union notified Mrs. Tu of the
21 arbitration decision. Plaintiffs then filed an amended
22 complaint in April 1988, naming the Union as a defendant on
23 the fair representation claim.
24 The Ninth Circuit in Galindo v. Stoody Co., 793 F.2d 25 1502, 1510 (9th Cir. 1986), held that a fair representation
26 claim based on how a grievance is presented to an arbitrator
1 accrues when the employee learns of the arbitrator's decision."

2 The policy behind such a rule is the furtherance of nonjudicial

3 resolutions.

4 Based on Galindo, this Court GRANTS plaintiffs' motion plaintiffs' motion for

5 reconsideration. Since the statute of limitations the statute of limitations did not begin

6 to run until Mrs. Tu was informed of the arbitrator's decision

7. in January 1988, her amended complaint was timely filed in April 8

8. 1988. Accordingly, this Court vacates its earlier order

9 granting summary judgment to defendant Union. The Court's

10 ruling is without prejudice to a renewal by defendant Union of its motion for summary judgment.

11 Plaintiffs are directed to file an amended complaint by June

13 2, 1989.

the status conference set for May 10, 1989, for is

vacated.

IT IS SO ORDERED.

DATED: May 1989.

D. Lowell Jensen

United States District Judge

F I L E D UNITED STATES DISTRICT COURT

AUG 14,989

NORTHERN DISTRICT OF CALIFORNIA

U.S. DISTRICT COURT NORTHERN DISTRICT OF CALIFORNIA

3 SIEU MEI TU and JOSEPH TU,

C-87-1198-DLJ

4 Plaintiffs, ORDER GRANTING

5 v. DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

6 SOUTHERN PACIFIC TRANSPORTATION COMPANY, et al.,

7 Defendants.

8 On July 26, 1989, this Court heard the union 10 defendants' motion for summary judgment and motion to

11 strike. James M. Darby and Kathleen S. King appeared for

12 defendants Brotherhood of Railway, Airline and Steamship

13 clerks, R. B. Brackbill, and J. M. Balovich. Lee J. Kubby

14 appeared for plaintiffs.

15 For the following reasons, this Court GRANTS

16 defendants' motion for summary judgment. Since only "Doe"

17 defendants remain in the action, this Court DISMISSES

18 plaintiffs' second amended complaint WITH PREJUDICE. WITH PREJUDICE.

19 Defendants' motion to strike motion is therefore MOOT.

20

21 I. BACKGROUND

22 Plaintiff Sieu Mei Tu, a sixty-two year old Asian

23 female, was laid off from employment by the Pacific Fruit

24 Express Company (PFE), a subsidiary of Southern Pacific

25 Transportation Co. (SP). Plaintiffs Sieu Mei Tu and Joseph

26 Tu claim that Sieu Mei Tu was terminated by PFE because of

27

her age, sex, and race, in violation of the California Fair 2 Employment and Employment and Housing Act. Plaintiffs further allege that the union defendants breached their duty of fair 3 representation under the Railway Labor Act, 45 U.S.C. 151 4 et seq, by failing to adequately prosecute Sieu Mei Tu's 5 grievance against PFE.

7 II. STANDARD FOR SUMMARY JUDGMENT

8 Under Rule 56(c) of the Federal Rules of Civil 9 Procedure (FRCP), summary judgment may be granted when the 10 pleadings, depositions, answers to interrogatories, and 11 admissions on file, together with the affidavits, if any, 12 show that there is no genuine issues as to any material fact 13 and that the party is entitled to a judgment as a matter of 14 law."

15 In a motion for summary judgment,

"[i]f the party
16 moving for summary judgment meets its initial burden of
17 identifying for the court those portions of the materials on
18 file that it believes demonstrates the absence of any
20 genuine issues of material fact," the burden of production then shifts so that "the nonmoving party must set forth, by
22 affidavit or as otherwise provided in Rule 56, "specific
23 facts showing-that there is a genuine issue for trial." T.W. Electrical Service, Inc. v. Pacific Electrical
24 Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987) (citing
25 Celotex Corp. v. Catrett, 106 S. Ct. 2548, 2553 (1986);
1. Kaiser Cement Corp v. Fischbach & Moore, Inc., 793 F.2d
1100, 1103-4 (9th Cir.), cert denied, 107 S. Ct. 435 (1986))

(emphasis in original). Summary judgment may issue after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. Celotex Corp., 106 S. Ct at 2553-54. The standard for judging either a defendant's or plaintiff's motion for summary judgment is the same standard used to judge a motion for a directed verdict: "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson v. Liberty Lobby, Inc., 106 S. Ct. 14 2505, 2512 (1986).

15 Under this standard, the Court finds that no genuine

16 issue of material fact remains with respect to plaintiffs'

17 claim for breach of duty of fair representation. Summary

18 judgment is therefore appropriate.

20 III. BREACH OF DUTY OF DUTY OF FAIR REPRESENTATION

21 Defendants move for summary judgment on plaintiffs'

22 claim for breach of duty of fair representation. A union

23 violates its duty of fair representation only if its conduct

24 toward a member of the collective bargaining unit is

25 arbitrary, discriminatory or in bad faith." Vaca v. Sipes,

1. 386 U.S. 171, 190 (1967); Salinas v. Milne Truck Lines

Inc., 846 F.2d 568, 569 (9th Cir. 1988). A court must

initially determine whether the act in question involved the union's judgment or whether it was procedural or ministerial.1 Moore v. Bechtel Power Corp., 840 F.2d 634, 5 6 636, (9th Cir. 1988). If a union's judgment is in question, the plaintiff may prevail only if the union's conduct was "discriminatory or in bad faith."ID Defendants argue that they are entitled to summary judgment because they acted in good faith and without a discriminatory motive in representing Sieu Mei Tu.

Defendants advance five arguments to support their claim that their conduct was neither discriminatory or in bad faith.

First, defendants point out that, in anticipation of the closing of the Brisbane office, they filed a claim under

16 the collective bargaining agreement with PFE on behalf of

17 Sieu Mei and others similarly situated. In the claim,

18 defendants stated that PFE was wrongfully transferring work

19 to other companies and locations without providing employees

20 with "TOPS" protection.1

21 Second, defendants note that after Sieu Mei Tu and

22 seven others were laid off, they filed another grievance,

24 insisting that the employees be permitted to follow their

25 1"TOPS" protection provides job guarantees and monetary benefits for employees adversely affected by abolishments

26 and/or transfers

1. work to San Francisco or be provided with "TOPS" protection. The union eventually appealed both grievances. appealed both grievances.

2 Third, defendants note that in response

to the
3 inquiries by plaintiffs' counsel, defendants informed him by
4 letter that the union was pursuing a claim under the
5 collective bargaining claim under the collective bargaining agreement on Sieu Mei Tu's behalf.
6 Fourth, defendants point out that they held meetings
7 with the Brisbane clerks during this period, which Sieu Mei
8 Tu attended, to inform the members of the actions the union
9 was taking against PFE.
10 Fifth, defendants contend that they took the grievance
11 to arbitration and were ultimately unsuccessful. However,
12 defendants maintain that they convinced
the arbitrator that
13 the laid off employees, including Sieu Mei Tu, should be

given priority consideration for new jobs with SP.

Defendants note that they provided Sieu Mei Tu's name and

address to SP for reemployment consideration, any she was

interviewed for a new position as a result of their efforts.

This Court finds defendants' argument persuasive.

Defendants' adherence to established procedures for handling

grievances suggest that its conduct was neither

discriminatory or in bad faith, and therefore or in bad faith, and therefore not a breach

of duty of fair representation. See Johnson v. United

States Postal Service, 756 F.2d 1461, 1466 (9th Cir. 1985).

Opposing defendants' motion, plaintiffs allege in their

papers and at oral argument that defendants

breached their

1.duty of fair representation

by acting in an arbitrary, prejudicial, and perfunctory manner by failing: (1) to

2 present any evidence at the arbitration hearing; (2) to

3 confer with Sieu Mei Tu or her attorney concerning her

4 claims; (3) to make a discrimination claim on her behalf;

5 and (4) to protect her from retaliation. As support,

6 plaintiffs only refer only refer to the transcripts of the arbitration

7 hearing, the Interstate Commerce Commission's hearing, and

8 this Court's hearing on the Railroad defendants' motion for

9 summary judgment.

10 This Court finds plaintiffs' argument unpersuasive. A

11 party responding to a motion for summary judgment may not

rest on mere allegations of pleadings but, rather, must set forth specific facts showing there is a genuine issue for trial. Celotex, 106 S. Ct. at 2552. Id at 2552. It is the non-moving party's burden to produce evidence that would support a jury verdict in his favor. Anderson, 106 S. Ct at 256.

In response to defendants' motion, plaintiffs refer only to the transcripts noted above and the prior declarations that plaintiffs filed in opposition to the Railroad defendants' prior motion for summary judgment.

Even assuming that there that there is evidentiary material properly before the Court before the Court in the transcripts, there is no showing by this material or by the declarations that the

defendants'
24 conduct was either discriminatory or in bad faith.
25 Plaintiffs have therefore failed to present any evidence which raises a genuine issue of material fact. Since plaintiffs offer only the conclusory allegations that
2 disputed material exists, without offering the necessary
3 supporting evidence, plaintiffs have failed to raise a
4 triable issue of material fact with respect to their claim
5 for breach of duty of fair representation.
6 Accordingly, this Court GRANTS defendants' motion for
7 summary judgment as to plaintiffs' claim for breach the duty
8 of fair representation against the union defendants. Since
9 union officers are immune from personal liability for acts
10 undertaken as union representatives, Peterson

v. Kennedy, 11 771 F.2d 1244, 1256-57 (9th.Cir. 1985), summary judgment is

12 also appropriate in favor of R. B. Brackbill and J. M.

13 Balovich, named as individual defendants.

14 CONCLUSION

16 Therefore, this Court GRANTS defendants' motion for

17 summary judgment as to plaintiffs' claim for breach of duty

18 of fair representation and DISMISSES WITH PREJUDICE

19 plaintiffs' second amended complaint. Defendants' motion to

20 strike is now MOOT.

21 IT IS SO ORDERED.

22 DATED: August 11, 1989

23 D. Lowell Jensen

24 United States District Judge

Filed Aug. 14, 1989

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SIEU MEI TU and JOSEPH TU,

4 C-87-1198-DIJ

Plaintiffs,

5 JUDGMENT

6 SOUTHERN PACIFIC TRANSPORTATION

7 COMPANY, et al.,

8 Defendants.

10 For the reasons set forth in this reasons set forth in this Court's order granting defendants' motion for summary judgment, issued on 12 August 11, 1989, judgment is hereby entered in favor of 13 defendants.

15 IT IS SO ORDERED.

16 Dated: August 11, 1989

18 D. Lowell Jensen

United States District Judge

SERVICE DATE

SERVICE DATE DEC 4, 1992

INTERSTATE COMMERCE COMMISSION

DECISION

Finance Docket No. 30400 (Sub-no. 21)

SANTA FE SOUTHERN PACIFIC CORPORATION -- CONTROL SOUTHERN PACIFIC TRANSPORTATION COMPANY

Decided: December 3, 1992

By decision served June 18, 1992, the Commission reopened this proceeding and established a procedural schedule to give employees of the Southern Pacific Transportation Company (SPT) an opportunity to demonstrate that they were adversely affected as a direct consequence of actions taken or orders issued by the Santa taken or orders taken or orders issued by the Santa Fe Southern Pacific Corporation (SFSP) in contemplation of the proposed merger of The Atchison, Topeka Atchison, Topeka and Santa Fe Railway Company and SPT.1 Discovery matters were subsequently referred to the Office of Hearings, and the procedural schedule has been modified several times to accommodate times to accommo-

date them.

Urging that they are injured parties, Sieu Mei Tu, a former employee of Tu, a former employee of Pacific Fruit Express (PFE), and her husband Joseph Tu (collectively, Tu) moved to compel the production of documents from SPT and SFSP. SPT and SFSP objected. On November 9, 1992, the Chief Administrative Law Judge (CALJ) issued an order granting production of certain of these documents, but only as they related to PFE. Only one of the ten production requests approved by the CAIJ was made applicable to SFSP since it had otherwise complied with the CALJ'S limited production requirements. On November 13, 1992, SPT appealed the CALJ'S decision. Tu replied. SPT'S appeal is taken pursuant to 49 CFR 1011.7(b)(1). Under this section, the Chairman acts on appeals. These appeals are not favored; they may be granted only in exceptional circumstances to correct clear error of judgment or to prevent manifest injustice.

SPT argues that the CALJ'S order: (1) is contrary to precedent because it has been estab-

lished that Tu's former employer is not a carrier subject to this Commission's jurisdiction and as a consequence Tu is not a proper party; (2) is inconsistent with the Commission reopening decision because it precluded employees from pursuing individual claims at this time; and (3) violates the doctrines of res judicata and collateral estoppel because Tu's claims have previously been litigated.

1 The proposed merger was denied in Santa Fe Southern Pacific Corp.--control--SPT Co., 2 I.C.C.2D 709 (1986) reconsideration denied, 3 I.C.C.2D 926 (1987). Thereafter, in Railway Labor Executives' Assn, v. ICC, 924 F.2d 961 (9th Cir. 1991), the court determined that this Commission possessed discretionary conditioning authority under 49 U.S.C. 11344(c) to "impose conditions governing the transaction" with respect to labor protection for adversely affected employees. It remanded the case for the Commission to determine whether to exercise that discretionary authority, and in response this proceeding was reopened.

SERVICE DATE;JUN 18 1992

Finance Docket No 30400 (sub.no. 21)

SANTA FE SOUTHERN PACIFIC CORPORATION--CONTROL SOUTHERN PACIFIC TRANSPORTATION COMPANY

Decided: June 12, 1992

BACKGROUND

In Santa Fe Southern Pacific Corp. --Control--SPT Co., 2 U.C.C. 2d 709 (1986),recon den 3 I.C.C. 2d 926 (1987) (SFSP), the Commission denied the proposed merger of The Atchison, Topeka and Santa Fe Railway Company (Santa Fe) and Southern Pacific Transportation Company (SPT). The Santa Fe Southern Pacific Corporation (SFSP) had owned the stock of SPT since December 1983 under a commission -approved independent voting trust that had enabled the two railroads' holding companies to merge. After the proposed rail merger was denied, SFSP was required to divest its interest in either Santa Fe or SPT. SFSP chose to sell SPT's stock to Rio Grande Industries (Rio Grande), and that acquisition was approved by the Commission in Rio Grande Industries, et al--Control SPT Co. et

al, 4 .I.C.C. 2d 834 (1988) (Rio Grande), aff'd sub.nom. Kansas City Indus. Inc. v. United States, 902 F. 2d 423 (5th Cir 1990). The voting trust was dissolved on October 13, 1989, when the Rio Grande-SPT acquisition was consummated.

During the Rio Grande proceeding, the Railway Labor Executive's Association (RLEA) and the International Brotherhood of Teamsters (IBT) argued that certain SPT employees had been adversely affected by employer actions taken in anticipation of the Santa Fe-SPT merger. In Rio Grande, the Commission concluded that it was not required to impose labor protective conditions under 49 U.S.C. 11347 for the benefit of employees adversely affected by the rejected ATST-SPT merger and that it was not appropriate to impose labor protection for those employees in the context of Rio Grande's acquisition of SPT. Because of its continuing jurisdiction over the SFSP voting trust, the commission instead noted that SFSP was in a different position than Rio Grande and that the Commission's

labor protection power would extend to employees adversely affected by SFSP.

After consideration of comments, in a decision served February 9, 1989, the Commission determined that: 0 (1) the unilateral displacement of employees by Santa Fe or SPT management, even in anticipation of the disapproved merger, would be governed by the applicable collective bargaining agreements between these carriers and their employees; (2.) there would be no basis for imposing labor protection on SFSP for merger anticipatory actions it could be shown to have ordered Santa Fe to take because SFSP was lawfully in control of Santa Fe and any grievances by Santa Fe employees would be found in collective bargaining agreements between Santa Fe and its employees; (3) no basis had been shown to impose conditions for the benefit of SPT employees pursuant to section 11347; and (4) if any merger anticipatory actions adverse to SPT employees were shown to have been ordered by SFSP, in violation of section 11343, the adversely affected individuals would have a

court remedy under 49 U.S.C.11705.

Finance Docket No. 30400 Cont-no. 21)

On judicial review, the United States Court of Appeals for Court for the Ninth Circuit largely affirmed the February 9 decision.1 It concluded that aggrieved SPT employees did not have available to then a cause of action in the courts under section 11705.2 Instead,it determined that the Commission possessed discretionary conditioning authority under its 49 U.S.C. 11344 (c) "to impose conditions governing the transaction" respect to labor protection for adversely affected employees, and remanded the cans for the Commission to determine whether to exercise that discretionary authority.

The Commission sought rehearirg on the portion of the court's decision remanding the proceeding to the Commission to consider in its discretion whether labor protection should have been imposed upon the merger denial. We argued that section 11344 (c) clearly contemplates imposing conditions only when a transaction is approved.

On rehearing, the Ninth Circuit expressly agreed with our conclusion that the labor protective conditions mandated by section 11347 for approved transactions are not appropriate here.3 Additionally, the court deleted the explicit references in its earlier decision to a discretionary Commission authority under section 11344(c) to impose labor protection when denying a transaction.

Instead, the court determined that section 11344 (c) contains a general discretionary conditioning authority under which the Commission is to consider and condition a transaction with respect to anti-competitive (section 11344(b)(1)(E)] and other relevant factors including labor [section 11344(b)(1)(D)]. Coupling this general conditioning authority with the Commission's divestiture order (and possibly the Rio Grande approval decision), the court directed us to consider in our own discretion whether labor protection should be imposed as a condition of the divestiture.

DISCUSSION AND CONCLUSIONS

We do not view the court decision on rehearing, as basing our discretionary conditional authority on the merger denial. Indeed, we continue to view divestiture as a legal requirement emanating from our merger disapproval. Accordingly, we view the court decision on remand as relating to our continuing jurisdiction over SFSP from the time the voting trust was in effect, through the time the merger was denied, until the time the divestiture was consummated. Several of the early Commission decisions reflected the intention to monitor SPT'a situation continually as it was held in the voting trust pending consummation.

1 Railway Labor Executives' Assn. v. ICC 924 F.2d 941 (9th Cir. 1991)

2. The court cited its earlier decision in Kraus v. Santa Fe Southern Pacific Corp., 878 F2d 7.2d 1193 (1989) (Kraus). There it had ruled that the commissions merger jurisdiction was exclusive and precluded aggrieved employees from filing claims directly with the district court under section 11705. It noted that in Kraus it had explicitly rejected our February 9 decision's reasoning on the section 11705 issue.

3. Railway Labor Executives' Ass'n v ICC 958 F2d 252 (9th Cir. 1992) (superceding previous opinion)

For example, the Commission approved the voting trust in the SFSP consolidation proceeding, 4 based in part on the stipulation that the voting trust could at any time be modified to ensure compliance with the law. Also, interested parties affected by SPT's actions were to be free to petition the Commission where it might be shown that actions were taken against SPOT's interest and for the benefit of Santa Fe or its parent. The Commission stated at page 13 that "...we do not at the outset put any limit on the type of condition that might be imposed....We should not hesitate to impose conditions to rectify abuses that might develop in these or any other areas.9

Subsequently, on February 27, 1987, the Commission served a decision based on an investigation of the operations of the voting trust up to that time. The investigation had disclosed undesirable contacts among the parties in several areas. Between the voting trust as implemented and SFSP's undertakings, the Commis-

sion concluded that SPT had not been insulated from SFSP to the extent intended. The decision clarified the trustee's obligations, emphasized that SPT's independence was the responsibility of both the SFSP and SPT managements, and stated that the relationships among the parties would continue to be monitored.

Then in the remanded February 9, 1989 decision, the Commission stated that any control SFSP exercised over SPT during the voting trust period would be subject to its jurisdiction by virtue of the voting trust. Specifically, it noted at page 2 that "(t)he carriers agree...that we would have authority over violations of the voting trust."

In the Rio Grande decision, supra, at 955-56, the Commission again recognized its continuing jurisdiction over the voting trust and matters related to it. It stated as follows:

"In authorizing (SFSP) to control SPT through a voting trust, we subjected SFSP to our continuing jurisdiction with respect to any number of matters, including the possible imposition of

additional conditions that we might deem necessary.... (W)e believe it is within our power to provide that ATSF or SPT who can demonstrate that they were adversely affected as a direct consequence of actions taken, or orders issued, by SFSP in contemplation of the merger which we ultimatly denied, be afforded labor protection in Finance Docket No. 38400."

Consistent with the court remand, we are reopening this proceeding to give SPT employees (as a class) an opportunity to demonstrate that they were adversely affected as a direct consequence of actions taken or orders issued by SFSP in contemplation of the proposed ATSF-SPT merger. We seek specific evidence from the parties with respect to those actions or order issued by SFSP which may have affected SPT operations and work related assignments. We are not at this time seeking personal statements from individual employees who believe they were adversely affected by SPT actions. The parties may also comment on whether and how New York Dock Ry-Control-Brooklyn Eastern Dist. 360 ICC

60 (1979) (New York Dock, may be modified

4. Finance Docket No. 30400, Decision No. 2, Santa Fe Southern Pac. Corp. -Control-Southern Pac. Trans. Co: Mercer Atchison, T & SFR Co. and Southern Pac Trans. Co (not printed, served December 23, 1983.
Finance Docket No. 30400 (sub No. 21)

procedurally and substantively to provide relief to adversely affected employees. 3

This action will not significantly affect either the quality of the human environment or energy conservation.

It is ordered:

1. This proceeding is reopened.

2. Former employees of the Southern Pacific Transportation Company or their representatives shall file evidence and argument as described above by August 3, 1992, replies shall be filed by September 1, 1992, and rebuttal shall be filed by September 21, 1992.

3. This decision is effective on June 18, 1992.

By the Commission, Chairman Philbin, Vice Chairman McDonald, Commissioners Simmons, Phillips, and Emmett

(seal) Sidney L. Strickland, Jr.

S e c r e t a r y

3 In the February 9 decision, at page 3, the commission recognized that the conditions fashioned in New York Dock are ordinarily imposed in approved consolidation cases and the they:

provide for preservation of seniority, negotiated implementing agreements and arbitration, and severance pay, [and] are clearly designed to cushion the adverse impacts on labor of consummated transactions.

In the Matter of the Arbitration Between

PACIFIC FRUIT EXPRESS COMPANY

and

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAM SHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES

-OPINION AND AWARD -(Transfer of work;--- separation allowance)

The hearing in the above matter, upon due notice, was held in Stamford, Connecticut on August 6, 1987, before I. M. Lieberman, serving as Chairman of the Board of Arbitration, in accordance with the agreement between Pacific Fruit Express and Brotherhood of Railway. Airline and Steamship Clerks dated July 15, 1987. The parties waived the tripartite provisions of the Agreement in favor of a single arbitrator.

The case of Pacific Fruit Express, hereinafter referred to us the Carrier., was presented by K. R. Peifer, Assistant Vice President labor Relations. The case for the Brotherhood of Railway, Airline and Steamship Clerks, Freight

Handlers, Express and Station Employees, herein after referred to as the Organization, was presented by R. D. Brackbill, General Chairman.

At the hearing the parties were offered full opportunity to off evidence and argument. Both parties submitted documents with the substance of evidence in the case together with oral argument to supplement that documentation:

THE ISSUE

From the entire record the issue may be posed as follows:

"Did the Carrier violate the Agreement by failing to grant Claimants the right to follow work from the Pacific Fruit Express Company to the Southern Pacific Transportation Company or, in lieu thereof, grant Claimants separation allowances as provided for in the January 7, 1980 Agreement?"

DISCUSSION

The Carrier herein during this period was a wholly owned subsidiary of the Southern Pacific Transportation Comp[any. On August 15, 1`985 following an article which appeared in the press

the Organization filed a claim on behalf of all the employees (42) on the Pacific Fruit Express Seniority District 1 Roster alleging that Carrier was wrongly transferring their work to other companies in violation of the Agreements and also was taking steps to lay off all the Claimants through misapplication of the Agreement's decline in business provisions.

In the Claim the Organization insisted that the employees follow their position and/or work with their full rights and be compensated at their last assigned rate or protected rate, which ever is higher, until normal retirement age, or be given, if the employee so elects, a lump sum severance of 360 days pay at their last assigned or protected rate, which ever is the higher. The Organization alleged that Carrier was taking steps to discontinue the Perishable Freight Division of its activities, namely the Carrier herein, and was giving away the work of Claimants.

Carrier insisted that the claim in question herein was premature and anticipatory. Further, Carrier alleged that its actions were in total

concord with the provisions of the applicable Agreements of 1971 and the Special Agreement of January 7, 1980. By letter dated September 9, 1985, Carrier gave notice under those Agreements (20 days notice required) of it intent to abolish a number of positions in its Brisbane Headquarters and to transfer the clerical work of those positions to Southern Pacific Transportation Company. Nine employees were offered the opportunity to transfer with their positions. The remaining positions were abolished. Nine positions were created at the Southern Pacific Transportation Comp[any in its San Francisco General office. All employees who were not offered the opportunity to follow their work when the Brisbane office was subsequently closed, were furloughed, thus triggering the claims herein.

Carrier relies in part on the decline in business of this carrier. Specifically, Carrier notes that the business decline was caused by the competition of the trucking industry to the particular speciality of this Carrier. In that

context it is noted that the 1971 Agreement between the parties provided for a formula to determine decline in business which set forth that a decline in business in excess of 5% of the average percentage of both gross operating revenue and net ton miles in any 30 day period, compared with the average of the same period for the years 1960 and 1969 would permit a reduction in permanent positions and employees.

It is noted that that formula was amended in the course of the January 7th 1980 agreement between the parties (specifically Pacific Fruit Express) which specified that the percentages would be compared to 1970 and 1979 and that the old formula would be no longer applicable. In accordance with the new formula, Carrier submitted information concerning its activities during 1985 as compared to the averages of 1978 and 1979. Those figures on a month by month basis indicated declines ranging from January of 1985 where there was a 32.5% decline to December of 1985, where there was an 85.18% decline. It is evident from an analysis of the figures that

there was a precipitous decline in Carrier's revenue and ton-miles during the year 1985. In fact the figures show that the least percentage of decline during the 12 month period occurred in June of 1985, when there was merely a 16.09% decline (minus the 5%) and the high occurred in November of 1985 when there was a 97.06% decline.

Several problems exist in this claim. First, it is evident that there were certain specific functions and work which were transferred from Carrier to the Southern Pacific Transportation Company. Those were specified and spelled out in Carrier's notice to the Organization in accordance with the Agreement. Certain employees were permitted to transfer and follow their position.

The organization alleges that certain other work was also transferred to the Southern Pacific Transportation Company upon the closing of the Brisbane office of Carrier. However, there is no evidence whatever to indicate precisely what amount of the work the Organization claims was

indeed transferred. The lack of evidence makes it impossible for the Arbitrator to determine that there was indeed sufficient work transferred with out the concomitant opportunity for employees to follow their work. There is no evidence, and this is particularly significant, of the establishment of any of any new positions beyond those indicated by Carrier after the closing of the Brisbane office. The Organization relies on Article IV Section (a) of the January 7, 1980 Agreement in support of its claims. Unfortunately, those provisions which deal with an employee following his work or being permitted a severance allowance rely on facts which are not evident in this matter. Carrier has submitted ample evidence that its business declined precipitously during the year 1985. In addition there is no evidence that any positions were established at the Southern Pacific Transportation Company to which the furloughed employees from Brisbane could aspire. Carrier supported this practical application of the Agreement by providing copy of former B.R.A.C. General Chairman T. J. Dielh's October

5, 1982 letter interpreting the Agreement wherein he stated: "...parties to the September 16, 1971 Agreement Article IV Section 1 (a) employee cannot follow his work...." Clearly, Paragraph 3 of Article IV Section 1A which provides a severance allowance is not applicable since that provision relies in principal part on the requirement of an employee to move his residence in order to follow his position or work. There was no requirement that an employee from Brisbane going to San Francisco, even if a position were available, would be required to (the distance was not that great).

In summary, therefore, it is apparent that the Organization has not presented facts which would indicate that there was work indeed transferred from Carrier to its parent in San Francisco, which accrued to the incumbents who were laid off in Brisbane. In addition, Carrier has submitted significant evidence with respect to its decline in business. It is also apparent that this entire matter may be characterized as the parent company taking back work from its own

subsidiary. Such actions have long been held to be proper and do not constitute "coordinations" or triggering mechanisms for various protective benefits (see S.B.A. 605, Awards 390, 414, 320, and others). There is, in fact, no Rule support for Claimant's position. However, it must be noted that it is extremely desirable that the employees who were laid off at Brisbane and furloughed should be given priority consideration for future openings at the Southern Pacific Transportation Company in the San Francisco General office. The Arbitrator cannot mandate such action but can recommend it strongly.

For the foregoing reasons, however, the Claims in this instance do not have merit and they must be denied.

AWARD

Carrier did not violate the Agreement by failing to grant employees the right to follow work from Carrier to the Southern Pacific Transportation Company or in lieu thereof grant employees a separation allowance.

I.M. Lieberman, Arbitrator
Stamford, Connecticut
November 30, 1987

Docket .

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1 871 11, CAUSE: 08 LABOR: Railway

Labor Act: 45 USC 151, et seq PLAINTIFFS

DEFENDANTS TU, SIEU MEI AND TU, JOSEPH Z.

SOUTHERN PACIFIC TRANSPORTAT COMPANY,

ATCHISON, TOPEKA, S, FE RAILROAD COMPANY,

PACIFIC EXPRESS COMPANY, ALLEN, T.; D PR[PARED

E.E.; FEND, R. W.; ASHTON# 11' T',L,USING CA"

DOE DEFENDANTS ONE TO TWO TH(WHITE COMPANY,

BLACK CORPORA' FIRST AMENDED COMPLAINT i BRO-

THERHOOD OF RAILWAY, AIRLINE AN STEAMSHIP

CLERKS; R. B. BRACKBILL; BALOVICH; SANTA FE

SOUTHERN PACIFI ATTORNEYS LEE J. KUBBY, INC.

ROBERT S. BOGASON SOUTHERN PACIFIC TRANSPORATIO

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541-1786 Palo Alto, Ch 94304 (415)

856-3505

AND Patrick W. Jordan Wayne M. Bolio Defendant's Attorneys Cont.

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Los Angeles, CA 90040

Clerks, R.B. Brackbill, J.M. Balovich

(213) 267-5605 For: The Atchison, Topeka and Santa Railway Co. 6 Santa Fe Sourhem Pac Corporation STATISTICAL Al CHECK

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Chaoige PAUPLHIS UNITED STATES DISTRICT COURT

DOCKET

DC-1 I I TU -v- SOUTHERN PACIFIC TRANSPORTATIONO et al DATE Nft.

PROCEEDINGS C-87-1198 DLJ 1987 Mar 20 1 PETITION FOR REMOVAL from the Superior Court State of California, Cit and County of San Franciscot Caus #864666; documenl# removed; summon; and complaint. No process -Bond for removal: Surety-american Casualty Company of Reading, PA; Bond-$250.00 2 ORDER: First status conforence set for 6-17-87/9 a.m. DL, 23 3 Def,:ndant Pacific Fruit Express Company's ANSWER TO COMPLAINT 4 Defendants' first request

for production of documents 5 -notice of taking deposition: Edna Clark, 5-13-87/9:30 a.m. 6 -notice of taking deposition: Joseph Z. Tu, 5-12-87/9:30 a.m. 7 -notice of taking deposition: Siou Mei Tu, 5-11-87/9:30 a.m. 8 Defendant Southern Pacific Transportation's ANSWER TO COMPLAINT 24 9 Plaintiffs' Objection to Jurisdiction; demand for jury; objection to suf.iciency of bond 27 10 Defendants' notice of taking de?osition: Dr. Roberl e. Toi,ifoiicde, 9;30 a.in.; Dr. Ronald C. Lee, 9:45 a.in.; I)r. Ronald Elson, 10 a.all.; All said depositions will be taken on 6-13-87 June 5 11 Defendant's Pacific Fcuit Express Coinpany Status Confecence Stalement, June 17, 1987 at 9:00 a.m. 12 - Declaration of Wayne M. Bolio in support of Docuitient #11 11 13 Plaintiff's Status conference stateiiient on June 17, 1987 at 9:00 a.ii i8 14 MINUTES: (c/r:none), status conturence held on 6-17-87; further stat 8-5-87/9

I)LJ jui 16 15 Defendantsf first bet of inter-

rogatories to plaintiff 20 16 Plaintiffs' motion to remand to supecioc court, 8/19/87 at 9:30 aill - iiketuoraiidum of poirits dnd authorities ii-i suppoct thereof 28 17 Defendants' memorandum in opposition to plaintiffs' motion to remand 8/19/87 at 9:30 am r court (cenotice), 9/10/87 a Aug 3 18 Plaintiffs' motion to relmand to superio 10 am 19 Clerk's notice re: plaintiff has filed a motion to remand, noticed f hearing on 9/30/a7 at 10 am; opposition due 9/16/87; ceply tO opposition due 9/23/87 21 20 Plaintiffs' motion to reinand to Supecior Couct; declacation in suppo thereof, 9/30/87 at 10 am

SEE SHEET A DC IIIA

SHEET A C-87-1198 DLJ

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DEFENDˆNT SOUTHERN PACIFIC

DOCKET NO. TU

TRANSPORTATION CO., et al PAGE -

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PROCEEDINGS 1987 Sep 3 21 Defendants'

supplementacy brief in opposition to motion for remal 9/30/87 at 10 am 23 22 Plaintiffs' response to opposition motion to remand, 9/30/87 @10 30 23 MINUTES: (c/r: Jim Yeomans), plaintiff's motion to remand DENIED status conference not held; order to be prepared by defendant; c. continued to 12/16/87 at 9 am for further status. Oct 6 RECEIVED: Proposed order denying motion to remand 9 24 ORDER: Plaintiffs' motion to remand is DENIED. Entered 10/13/87, copies to parties. Clerk. 13 25 Defendants' proof of service by mail re: #24 15 Suuunona immued. Clork. (2 originals issued) 30 26 Defendants' notice of change of address of counsel Dv-c 24 25 De-fendants The Atchi-son, Topeka and Santa Fe Railway Cmpany and Santa Fe Southem Pacific Corporation's ANSWER TO CD"IRR, de -=d for jury trial 26 - de = d for prior pleadings and discovery 1988 Jan 20 27 Clerk's notice re: status conference has been scheduled for 3/4/88 at 9 am Feb 29 28

Defendants' notice of motion and motion to dismiss and/or for sumary judgmen 4/6/88 at 10 am

29 - memorandum of points and authorities in support of #28 30 - declaration of Kevin Block in support of #28 31 Clerk's notice re: defendants have filed a motion to dismiss, noticed for hed on 4/6/88 at 10 am; opposition due 3/23/88; reply due 3/30/88 Mar 4 32

HINUTES: (c/r none), status conference held; case continued to 4/6/88 at 10 a; for defendant's motion to dismiss.

D 23 33 Plaintiffs' response in opposition to motion to dismiss, 4/6/88 at 10 am 29 34 Defendants' reply brief in support of motion to dismiss and/or for summary judgment, 4/6/88 at 10 am OVER

SHEET A CONTINUED C-87-1198

DLJ C 111A lov. 1175) CIVIL DOCKET CONTINUATION SHEET "LAINTIFF

DEFENDANT SOUTHERN PACIFIC TRANSPORATION

DOCKET NO. TU

CO., et al PAGE

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PROCEEDINGS 1988 Apr 6 35 HINUTES: (c/r William Johnston), defendant's motion to dismiss GRANTED; order to be prepared by court; 30 days leave to amend.

DLJ 36 ORDER: Defendants' motion to dismiss is GRANTED; plaintiffs are GRANTED leave to amend the complaint to state a federal cause of action; amendment must be filed with 30 days. DLJ Entered 4/8/88, copies to parties. Clerk.

14 37 Defendants proof of service by mail of order on defendant's motion to dismiss 29 38 Plaintiffs' FIRST A14ENDED COMPLAINT ay 10 Summons on first amended complaint issued. Clerk. 19 39 Defendants Santa Fe Southern Pacific Corp A The Atchison, Topeka and Santa Fe Railway Co.'s notice of motion and motion for dismissal, 6/29/88 at 10 am 40 - memorandum of points and authorities in support of #39 41 - joinder in Southern Pacific Transporation Co.'s motion to dismiss 42 Defendants Southern Pacific Transportation Co. & Pacific Fruit

Express' notice of motion and motion to dismiss and/or for summary judgment, 6/29/88 at 10 am 43 - memorandum of points and authorities in support of #42 24 44 Clerk's notice re: defendant Southern Pacific has filed a motion to dismiss or for sumary judgment, noticed for hearing on 6/29/88 at 10 ani; opposition due 6/15/88; reply due 6/22/88 Jun 15 45 Plaintiffs' response in opposition to motion to dismiss - declaration of Lee J. Kubby in support thereof 21 46 Plaintiffs' corrections to response in opposition to motion to dismiss 22 47 Defendants The Atchison, Topeka and Santa Fe Railway Company and Santa Fe Southern Pacific Corporation's reply memorandum in support of motion to dismiss 48 Defendants Southern Pacific Transportation Co. and Pacific Fruit Express Co.'s reply brief in support of motion to dismiss and/or for summary judgment 29 49 HINUTES: (c/r Vivian Balboni), defendant S.p.'s motion to dismiss or for summary judgment; defendant Atchison, Topeka A Santa Fe's motion to dismiss and

for summary judgment; order to be prepared by court; 1Sst three claims are dismissed; 8th claim dismissed; remaining claims under submission. DLJ 50 Plaintiffs' supplemental declaration of Lee J. Kubby re motion to dismiss opposition SEE SHEET SS#BSS'

SHEET "B"

C-87-1198 DLJ DC IIIA

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SHEET PLAINTIFF

DEOENDANT

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SOUTHERN PACIFIC TRANSPORTATION CO. PAGE -OF- P

DATE NR.

PROCEEDINGS 1988 Jun 30 bi ORDER: The first, second, third, fifth and seventh causes of action are DISM with prejudice; court will exercise its pendent jurisdiction over fourth and claims; defendant railroads are DISMISSED from eighth cause of action; defen Santa Fe and Railway are DISMISSED from all causes of action; status confere will be held on

9/7/88 at 9 am. Entered 7/1/88, copies to parties. Clerk Aug 2 52 Defendents Brotherhood of Railway, Airline and Steamship Clerks, R.B. Brackb-and J.M. Balovich's MSWER TO FIRST AMENDED COMPLAINT Sept 7 53 MINURES: (c/r none) status conference held; case coritiiiuud to 12/14/88 at 10:00 a.m.; James Darby admitted pro hac vice; Plaintiff will not serve individual defendants based on oc)urt's previous order, and court agrees; Deferidant to file s=m judgment mc)tion by 11/16/88; issue order. 12 54 ORDER: Defendantle are to file and serve their motion for s=m judg=t 11/16/88. He"irwg and further status corlterence, t-o ix. htld on 12/14/88 at I a.m. 27 55 Pl"tiffs' notioe to take dqmition of J. M. Balovich and R. B. Brackbill 10/26/88 at 10:00 a.m. oct 17 56 ORW. ca" referred to Chief magistrate for purposes of disoovery On'y-24 57 ORDER: deposition of i.m. @ich to be cont-inued to 11/21/88 and deposit-R.B. Brackbill tO 11/22/88; Magistrate will request fran Judge Jensen addii

tirm for plaintiff's response 21* 58
MAGISR= MINURES: (c/r n=) diwmery hearing in person and via ph0m; minuto ordar to be entered - see #57. 59 STIP=ION AND ORDER.
ts to file their motion for su 27
. last day for defendan j t continued fran 11/16/88 to 1/4/89; Mming coitinutd trcm 12/14/b 2/1/89 at 10:00 a.m.,.and further status con-fere= to Lx-- h(-,ld at sam tim, Nov 7 60
Clerk's notioe to counsel that status conference and mc)tlons fran 2/1/89 to 2/2/89. Notioe of motion and notim for dinmlification or other appropriate saric' 23 61 Southern Pacific 'D co. and Pacific Fruit Effress Co.); hear-in, 12/28/88 at 10:00 a.m. 62 - mawranduu of points and authorities in support of #61 63 - declaration of Kovin Block 64 - doclwation of Posey Hudnall R=IVED:
order granting defendants' motim for di f ication OVER DC IIIA
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PACIFIC TRANSPORTATION CO. DOCKET NO. et al

PAGE - OF_ PA, DATE NR.

PROCEEDINGS 1989 Jan 3 65 Defendants Southern Pacific Transportation Co. and Pacific Fruit Express Co.1. declaration of Kevin Bl " . 66 - Declaratim of Chere Bonche. 67 - proof of servioe of Stipulation and order continuing hearing on motion for disqualification, docurnents #65 wd 66. 4 68 Union Defendants' motion for a judg=t or, in the alternative, wtion dismiss, Feb. 2, 1989 at 10:00 am. 69 - statement of material facts as to which there is no dispute. 70 - Memrwdm of points and authorities in support of #68. 71 - Declmation of R.B. Brackbill. 72 - Declaration of James M. Darby. FFM.I=-. Propo#w Order granting niotion for s judgment. 73 STIPULATION AND ORDER: Hearing on defendants' mtion for disqualification or other appropriate sanctions, previously set for Dec. 28, 1988 be

oontinued to Jan. 25, 1989 at 10:00 a.m. 74 Clerk's notioe to Counsel Re: there is already a hearing date and status oonf, set for Feb. 2, 1989, the defendants' motion to disqualify counsel will also heard on Feb. 2, 1989 at 10:00 a.m. There will be no any hearing on Jan. 25, 5 75 Defendants Southern Pacific Transportation Co. and Pacific Fruit Express CO.'., notioe of motion affl motion for s judgment, Feb. 2, 1989 at 10:00 a.m. 76 - ?.Wwranliun of points and authorities in support of motion for s judc5a 77 - Declaration of Ricahrd Fend in support of #75. 78 - Declmation of Tom Ellen in support of #75. 79 - Proof of mmioe of documents #75 thru 78. RECEIVED: Pr order granting defendants' motion for s judgment. 7 80 Clerk's notioe to Counsel Re: Union defendant's mc)tion for s judginent O,, dismissal is set for Feb. 2, 1989 at 10:00 a.m.; opposition papers by Jan. 19 1989; reply pqxrs by Jan. 26, 1989. sm S= c OC IIIA

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PROCKEDINGS 1989 Jan 9 81 Deferdants Southern Pacific Transporlation Co. and Pacific Fruit Express rkotice of mc)tion fckr disqualification or other appropriate saricti Feb. 2; 1989 at 10:00 a.m. 82 - Proof of servioe of stipulat-ion and order continuing hearing on motior eiiscinial-ifimt;lon; notice from Court Re: motion; Amended not:lce of mot:lor 12 83 clerk's notice that deft mdtion for s judgment will be hem on 2/ at 10mu. 19 64 Plwtiffal notioe of changs of address. 85 - objw" to and =" to strike portioris of declarations in Support C for sum" i ; 2/2/89 at 10:00 a.m. 86 - statewnt of disputed material facts in opposition to motion for swm ment. 87 - m=== of points ad authoritiw in opposition to motion for suam 88 - Declaration in opposition to motion-for disqualification. 89 - Decla-

ration of Lee J. Un In opposition to mouons for su=m Judgii go - Declaratim in oppo"tim to motion for sunran judgment. Propowd order Re: motion for s j t WA motion to 26 91 unim Defendants I reply to plaintif f s I mamrwduu of oppwition to mom summm judgmt; Feb. 2; 1989 at 10:00 a.m. 92 lwation of xa S. LM in sup" of #91. 93 Defendants Southern Pacific Transportation Co. and Pacific Fruit Expre-ss reply brief in support of mdtion for lification or other appropria Feb. 2g 1989 at 10:00 a.m. 94 - reply brief in of mdtion for s judgmt. 95 - Declaration of Kevin B= in support of #94. 96 - Stffl mm-ni-,m I-1=aum of Kovin Block. Feb 2 97 c/r Now) Beld status oonference 2/2/89; Ddfendmt's motim f ion Denied; Defendant's motion for s judg = t under E Smthern Pacific,a motion for s judgmmt under s ic OVER

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DEFENDANT DOCKET NO. Sim MEI TU

PACIFIC TRANSPORRATION PAGE_OF--PAGE, DˆTL NR. PROCEED-INGS 1989 Defendants' motion for s jud"t are GRANTED, as to plaintiff's Feb 6 98 ORDM cl" for discr""tion, loss of oonsortixxn and breach of fair representation; Defendants' motion for Disqualifacation DENIM. DLJ : 2/9/89 clerk 99 JUDGMERR: Re.- order #98 in favor of defendants. DLJ ENTERED: 2/8/69 malled oopites to counsel clerk 16 100 union Brotherhood of Railway's brief in support of taxation costs. 101 servioe 102 Is bill of oosts.for Brotherhood of Ralilway. 103 Southern Pacific's bill of costs. 17 104 notice of rrotion and mc)tion new trial , vacate, reoonsider, amffl ir altar judg=t, relief fran j t. set 3/22/89 at 10:00

a.m. 105 - Mem of points and authorities rei #104 Proposed orm # 104 20 106 notioe of Plwtiff's motion for reconsiclration sat 3/22/89 at 10:00 Mar 7 107 Iaetter to clerk frcm yathleen ying re stipulation continuing hearing date. 108 Defendants Union' declaration of Ka S. King. 109 STIPULATION AND ORM. modificationof briefing schedule, see order for wre in DL.J 22 110 Defendant's uriioni Opposition to plantiff's motions for new trial for vacate and reoonsideration. set4/12/89 at 10:00 a.m. 111 - Maw in opposition re # 110 29 112 Plaint-iff's response oppositiu,. moticxi now trial , vacte, reoonsider, amw or alter j' t, relief fran judgwnt , an" findings. 4/12/89 10:00a.m. Apr 12 113 MR=: (C/r Carl Pline) pldintiff's nation for reconsideration under subds., 1 114 ORM-aintiffs' ion for o s as M,ay 3 . Court denies pl nidt rec ni ideration to defendnt Southern Pacific and GRAURS plaintiffs' motion for reconsidera-tion

as to Unioi 5/11/89 clerk Jun 2 115

1 SECOND N-Z= 12 116 5 notice of d"e of a"ess, vacation schedule cessation of fax. 15

117E s Motion for sumiary judgment set 7/26/89 at 10:00a m. 118 -mot-ion to strike various causes of action b= plaintiff's second amended cm SEE SHM "D" OC IIIA

'Od'i C-87-1198-DW CIVAL DOCKET CONTINUATION SHEET PLAINTIFF

DEFENDANT smu ni TU

PACIFIC Tms. DOCKET NO. PAGE-OF-

DATE NR.

PROCELDINGS 989 Jun 15 119 Defendant's stau=t of material facts as..:to which there is m dispute. 120 -Mclaration of R.B. Brackbill. R"-TVED: p"" order grant-ing motion for s judgment 7/26/89 at 17

121 Clerk's mtice of motion tO strike and a Motion for s judgment 7/26 10:00 a.m.

15* 122 Defendant's mom of points and authorities in support of mc)tion for sunna judg=t. 123 --Declaration of James Darby. jul 12 124

Plaintiff's objective to and mc)tion to strike portions of declaration in of mtions for summmy judgmant set 7/26/89 at 10:00a.m. 125 O" of points affl authorities in opposition of mc)tion for s judgni 126 -Incurporation by reference dwmation in opposition to s judgment 127 -Staw=t of disputed material facts. 19 128 Defendant's Union reply to plaintiff's mum in opposition to rwtion for si judg=t. set 7/26/89 at 10:00 a.m. 27 129 mm=: (c/r Diane skill=) Hearing of 7/26/89 Union Defendant's rotio strim and for s=w judgment under sui=ssim. Order to be prepared by Aug 14 130 ORDER: Court Grants defendants' mdtion for s ry judgment as to pl-iinti claft for breach of duty of fair representation and dismisses with prejxl, plaintiffs' mmnd omplaint. Defendants I mtion to strike is mc> : 8/21/89 clerk 131 JUDGMERR: For the reasons set forth in rhis oourt's order granting defend motim for s judgment, issued on 8/11/89 judgment is hereby entered favor of defenddnts.

Constitutional Provisions, Treaties, Statutes, Rules and Regulations

United States Constitution

Article III: Section 1:

The judicial Power of the United States, shall be vested in one supreme Court....

Section 2:

The judicial Power shall extend to all Cases in Law and Equity arising under this Constitution, the Laws of the United States.....

Amendment Article VII

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved....

28 USC 1254 (1):

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;"

28 USC 1291:

"The courts of appeals ...shall have jurisdiction of appeals from all final decisions of the district courts of the United States...."

28 USC 1445 (a):

"A civil action in any State court against a railroad...arising under sections 51-60 of Title 45, may

not be removed to any district court of the United States."

45 USC 51 provides:

> "Every common carrier by railroad while engaging in commerce between any of the several states ...shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce....

Rules of the Supreme Court of the United States

Rule 10 (1):

A review on writ of certiorari is not a matter of right, but of judcial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, whicle neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:

(a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter, or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b)....

(c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be settled by this Court. or has decided

a federal question in a way that conflicts with applicable decisions of this court.

Rules of Civil Procedure

Rule 4 (j):

"If a service of the summons and complaint is not made upon a defendant withing 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with-notice to such party or upon motion. This subdivision shall not apply to service in a foreign country pursuant to subdivision (i) of this rule.

Rule 6 (b):

"When by these rules or by a notice given thereunder or by order of the cvourt an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect....

Rule 56 (f):

"Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained

or depositions to be taken or discovery to be had or may make such other order as is just."

California Public Utilities Code:

Section 216:

(a) "Public utility" includes every common carrier...where the service is performed for or the commodity delivered to the public or any portion thereof.

Section 453:

(a) No public Utility shall, as to rates, charges, service, facilities, or in any other respect, make or grant any preference or advantage to any corporation or person or subject any corporation or person to any prejudice or disadvantage.

California Government Code:

Section 12940:

"It shall be an unlawful employment practice, unless based on a bona fide occupational qualification, or except where based upon applicable security regulations established by the United States of the State of California:
(a) For an employer, because of the race, religious creed, color, national origin, ancestry, physical handicap, medical condition, marital status, or sex of any person, to refuse to hire or employ the person or to refuse to select the person for a training program leading to employment,

or to bar or to discharge such person from employment, or to discriminate against such person in compensation or in terms, conditions or privileges of employment.

Section 12941:

(a) It is an unlawful employment practice of an employer to refuse to hire or employ, or to discharge, dismiss, reduce, suspend, or demote, any individual over the age of 40 on the ground of age, except in cases where the law compels or provides for such action.

Supreme Court, U.S.
FILED
JAN 25 1993
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No. 92-1096

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

SIEU MEI TU and JOSEPH Z. TU,
Petitioners,

v.

SOUTHERN PACIFIC TRANSPORTATION COMPANY; ATCHISON, TOPEKA, SANTA FE RAILROAD COMPANY; PACIFIC FRUIT EXPRESS COMPANY; T. ELLEN; E. E. CLARK; D. W. FEND; T. R. ASHTON; DOE DEFENDANTS ONE TO TWO THOUSAND; WHITE COMPANY; BLACK CORPORATION; BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS; R. B. BRACKBILL; J. M. BALOVICH; SANTA FE SOUTHERN PACIFIC CORP.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF IN OPPOSITION OF RESPONDENTS BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, R. B. BRACKBILL AND J. M. BALOVICH

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COUNTERSTATEMENT OF QUESTION PRESENTED

Whether the United States Court of Appeals for the Ninth Circuit correctly applied the relevant standards for breach of duty of fair representation when it held the plaintiffs/appellants had failed to meet their burden of proof affirmed the district court's grant of summary judgment?

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STATEMENT OF THE CASE

The plaintiffs/petitioners Sieu Mei Tu ("plaintiff" or "Mrs. Tu) and her husband, Joseph Z. Tue, commenced this suit by filing a state court action against Mrs. Tu's former employer, Pacific Fruit Express Company

("PFE"),[1] the Southern Pacific Transportation Company ("SP"), the Atchison, Topeka and Santa Fe Railroad ("AT&SF"), and various PFE officials ("the railroad defendants"). The complaint, filed September 26, 1986, alleged, inter alia, breach of employment contract, discrimination, loss of consortium on behalf of Joseph Z. Tu, and conspiracy. (R. 5)[2] The suit was then removed pursuant to the railroad defendants' petition for removal to the United States District Court for the Northern District of California. By Order dated April 6, 1988, the District Court granted defendants' motion for summary judgment on all causes of action based on plaintiffs' failure to state a federal cause of action. Declining to exercise pendent jurisdiction over the plaintiffs' remaining state claims, the court granted plaintiffs 30 days leave to file an amended complaint. (R. 284)

Plaintiffs then filed their First Amendment Complaint April 29, 1988. Said complaint was nearly identical to its predecessor but for a newly stated cause of action for breach of duty of fair representation against the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes (the "Union")[3] and two of its officers. The railroad defendants then filed a second motion to dismiss which the District Court granted in part on July 30, 1988. Although the Court found that plaintiffs' complaint had again failed to state a federal cause of action against the railroad, it did assert pendent jurisdiction over the state claims for discrimination and loss of consortium. (R. 304-08)

The Union then filed a motion for summary judgment on January 4, 1989 arguing that plaintiffs' fair repre-

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[1] A wholly owned subsidiary of the Southern Pacific Transportation Company.

[2] "R" refers to the page of the record as filed with the Court of Appeals.

[3] Effective September 1, 1987, the Union changed its name to Transportation•Communications International Union ("TCU").

sentation action was time barred and, even if timely, the allegations contained therein failed as a matter of law to constitute a breach of the duty of fair representation. (Docket Nos. 68-72) The railroad defendants also filed a motion for summary judgment on the remaining state claims of discrimination and loss of consortium. (Docket Nos. 75-79) The Court granted both the Union's and the railroad defendants' motions on February 8, 1989. (R. 890-97)

Pursuant to a motion for reconsideration filed by the plaintiffs on May 3, 1989, the District Court vacated its order as to the fair representation action being time barred and directed the plaintiffs to file an amended complaint by June 2, 1989. (R. 915-18)

On or about June 7, 1989, the plaintiffs filed a Second Amended Complaint which, save for the addition of some irrelevant facts and exhibits, was identical to the First Amended Complaint (R. 919). The Union refiled its motion for summary judgment on June 15, 1989. (Docket No. 117-23) In an Order entered on August 21, 1989, the District Court granted the Union's motion, finding there had been no showing that defendants' conduct was either discriminatory or in bad faith and that plaintiffs had "failed to raise a triable issue of material fact with respect to their claim for breach of duty of fair representation." (R. 1148-49)

Plaintiffs then filed a notice of appeal on September 8, 1989. The Ninth Circuit thereafter denied petitioners' appeal June 1, 1992 (App. Wr. Cert. 67-111).[4] Petition for rehearing was then filed. By Order of September 22, 1992, the Ninth Circuit found the petition was both untimely filed and without merit. (App. Wr. Cert. 112) Plaintiffs/Appellants then made their Application for Writ of Certiorari to Review Memorandum of Decision

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[4] "App. Wr. Cert." refers to the page(s) of the Application for Writ of Certiorari to Review Memorandum of Decision of United States Court of Appeals, Ninth Circuit, filed June 1, 1992.

of United States Court of Appeals Ninth Circuit on December 21, 1992.

STATEMENT OF FACTS

The relevant facts are accurately set forth in the District Court's opinion, and we will only briefly summarize them herein.

The petitioner Sieu Mei Tu was employed as a clerical employee by the Pacific Fruit Express Company from 1962 to 1985. Shortly after being hired by PFE, the plaintiff became a member of the defendant Union Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes (the "Union"), a labor organization representing clerical employees working for PFE. (R. 43, 322, 603)

The plaintiff was covered by various labor agreements between the defendant Union and PFE, including a "protective" agreement referred to as "TOPS." The "TOPS" Agreement permits the carrier to make certain organizational changes, i.e., to abolish and/or transfer positions, but provides that employees cannot be placed in a worse position with respect to compensation as a result of such changes. The agreement further provides that employees are not entitled to "TOPS" protection if their jobs are abolished as a result of a decline in the carrier's business below a level defined in the agreement. (R. 603-05, 616-35)

Sometime in 1985, it was rumored that PFE was planning to permanently close the PFE office at Brisbane, California, and that the general office work performed there was going to be taken back by the SP and performed at its San Francisco headquarters. (R. 126, 605-07) In anticipation of a permanent closing of PFE's Brisbane office, the Union's local chairman there filed a claim under the collective bargaining agreement on behalf of approximately 42 employees on the PFE seniority roster on August 15, 1985. Mrs. Tu was one of the 42

employees. The claim alleged that PFE was wrongfully transferring work to other companies and locations and was taking steps to layoff all the claimants by misapplying the "decline in business" exception to "TOPS" coverage. The Union insisted that employees adversely affected be provided with "TOPS" protection. (R. 607, 646-49)

By mid-September, 1985, PFE, via normal attrition and transfers of positions and work to other locations, had reduced the seniority roster at Brisbane from approximately 42 employees to 17 employees. It then transferred approximately 9 clerical positions to San Francisco. Pursuant to the "TOPS" Agreement, the incumbents of the nine positions were given first preference to follow their jobs. Thereafter, on October 2, 1985, PFE abolished 4 clerical positions, including Mrs. Tu's. As a result, Mrs. Tu and three other employees were laid off and notified that they were not entitled to "TOPS" protection since the abolishment was the result of a decline in business. Four more clerical jobs were then abolished and 4 more employees laid off, including the Union's local chairman, James Balovich. (R. 607-08, 656-62, 671-72)

Grievances over the abolishment of these eight positions, including Mrs. Tu's were progressed to an arbitration held before neutral referee I. M. Lieberman on August 6, 1987. The referee issued his decision sustaining PFE's position that the laid off Brisbane employees were not entitled to "TOPS" protection. Mr. Lieberman concluded that PFE and SP had successfully demonstrated a sufficient decline in business so as to escape any "TOPS" liability to the eight employees. He also concluded that, irrespective of the decline in business defense, a carrier that "takes back" work from a subsidiary has no obligation to provide protective benefits. (R. 612-13, 684-90) Mrs. Tu alleged that the Union did not fairly represent her in this arbitration.

REASONS FOR DENYING THE WRIT

I. PETITIONER'S APPLICATION FOR WRIT OF CERTIORARI IS UNTIMELY FILED.

Rule 13 of the Rules of the Supreme Court of the United States provides in pertinent part:

> .1. A petition for a writ of certiorari to review a judgment in any case . . . entered by . . . a United States court of appeals, . . . shall be deemed in time when it is filed with the Clerk of this Court *within 90 days* after the entry of the judgment. . . .
>
> * * * *
>
> .4. The time for filing a petition for a writ of certiorari runs from the date the judgment or decree sought to be reviewed is rendered, and not from the date of the issuance of the mandate (or its equivalent under local practice). However, if a petition for rehearing *is timely filed* in the lower court by any party in the case, the time for filing the petition for a writ of certiorari for all parties (whether or not they requested rehearing or joined in the petition for rehearing) runs from the date of the denial of the petition for rehearing or the entry of a subsequent judgment. (Emphasis added)

In the instant action the petitioners made application for writ of certiorari on December 21, 1992, to review a decision of the Court of Appeals for the Ninth Circuit issued June 1, 1992. The application on its face is untimely filed.

A Motion for Rehearing had been filed with the Ninth Circuit; however, in its order of September 22, 1992, denying the motion, that court found not only that the petition was without merit, but that:

> [B]y his own admission, appellants' lawyer knew of this court's memorandum disposition on June 26 and failed to file a motion to recall the mandate in a timely fashion. (App. Wr. Cert. 112)

As stated above, Rule 13.1 of the Rules of the Supreme Court requires that a petition for writ of certiorari be filed within 90 days after entry of the judgment sought to be reviewed. In the instant case, the relevant date is June 1, 1992. The application for writ, however, was filed December 21, 1992—well over 6 months, and far beyond the 90 day limitations period of the court rule.

It appears the plaintiffs erroneously calculated the 90 day period from the issuance of the order denying rehearing dated September 22, 1992. Their apparent reliance on Rule 13.4, however, is misplaced. The time for filing a petition for writ of certiorari runs from the date of the denial of the petition for rehearing *only* when it is "timely filed". In this instance petitioners' petition for rehearing was not timely filed as was duly noted by the Ninth Circuit in its order. As such, the time for filing ran from the June 1 judgment and lapsed on August 31, 1992.

II. PETITIONER'S APPLICATION FOR WRIT OF CERTIORARI IS WITHOUT MERIT.

This case involves no question of law that is novel, unique or requires review by this Court. As to the respondent Union, the case involves only the question of whether the Court of Appeals correctly canvassed the record in holding that the Union was properly granted summary judgment.

The lower court's affirmance of summary judgment is clearly consistent with this Court's rulings in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986), and *Celotex v. Catreet*, 477 U.S. 317 (1986), holding that parties opposing summary judgment motions may not rely on conclusory statements but must produce evidence sufficient to establish that "a jury might return a verdict in [their] favor." 477 U.S. at 324.

Applicants failed to introduce such evidence below, and the lower court properly affirmed the district court's decision granting summary judgment.

It is clear beyond any doubt that the Court of Appeals correctly stated the standard for duty of fair representation as encompassing conduct which was "arbitrary, discriminatory or bad faith." *Vaca v. Sipes*, 386 U.S. 171, 190 (1967). (App. Wr. Cert. 106) This Court has recently reemphasized that, to establish unfair representation, a plaintiff must show that a union's conduct was "so far outside a wide 'range of reasonableness' as to be wholly irrational or arbitrary." *Air Line Pilots Association v. O'Neil*, 499 U.S. —— (1991), 113 L.Ed.2d 51.

It is equally clear that the Ninth Circuit correctly stated that a plaintiff in an unfair representation case "must also establish the underlying grievance has merit." (App. Wr. Cert. 106) *See also Teamsters v. Terry*, 494 U.S. 558, 564 (1990); *Del Costello v. Teamsters*, 462 U.S. 151, 164 (1983).

Applicants do not argue that the lower court applied the wrong legal standard but, rather, urges that the Union was not entitled to summary judgment. The Ninth Circuit noted that applicants did not introduce evidence of discrimination or evidence to support her claim that the decline in business formula did not apply to her, as found by Arbitrator Lieberman. Instead of introducing such evidence, applicants made reference only to counsel's statements during her deposition and oral argument. (App. Wr. Cert. 107-09) They, in fact, cite in support of the correct standard the same cases relied upon by both the District Court and the Ninth Circuit in granting and upholding the Union's motion for summary judgment.[5] What they attempt to argue, however, is that the facts of this case make it somehow worthy of reviewing *how*

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[5] See pages 48-50, 105-106, and 163-165 of plaintiff/applicant's Application for Writ of Certiorari.

the correct standard was applied. The Supreme Court, however, does not sit to review and analyze facts where no legal issue is to be resolved.

Even so, the applicants are also wrong as to the facts. Applicants fail to make any showing that defendants breached their duty of fair representation by acting in an arbitrary, prejudicial or perfunctory manner sufficient to establish the existence of a genuine issue of material fact.

Petitioners also attempt to assert that a conflict in law among the circuits exists. Citing *McAlester v. United Air Lines, Inc.*, 851 F.2d 1249 (10th Cir. 1988), petitioners claim that the Ninth Circuit's decision was in conflict with the Tenth Circuit as to the preemption of the Railway Labor Act over federal and state tort claims. However, as noted in the appellate court's order, the District Court did not address the claims for violation of 42 U.S.C. §§ 1981, 1983 and 1985, or the conspiracy count in its decision because applicants failed to raise these issues before the Ninth Circuit.[6] Applicants are now precluded from doing so in their appeal to this Court.

Moreover, petitioners misstate the *McAlester* court's holding. In *McAlester* the plaintiff's 42 U.S.C. Section 1981 claim involved alleged disparate disciplinary actions by the employer. The court was quick to point out that the gravamen of the plaintiff's claim in that case was *not* that the provisions of the contract were applied by defendant in a discriminatory way. Rather, the court explained, the plaintiff in *McAlester* was asserting the disciplinary actions were in violation of federal statute. The Tenth Circuit went on to state that, although courts do have jurisdiction over claims based upon federal statutes, courts have no jurisdiction to hear claims arising from provisions of a collective bargaining agreement. *Id.* at

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[6] See footnotes 3 and 4 of the June 1, 1992, Memorandum of the United States Court of Appeals for the Ninth Circuit.

1253. *See also Steelworkers of America v. Rawson*, 495 U.S. 362, 372-73 (1990); *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 406-10 (1988).

In the instant case, plaintiffs' claims against the Union do stem from an alleged violation of a contractual provision. Plaintiff here maintains that she was unfairly represented based upon her denial of protective benefits which she was allegedly entitled to by right under the collective bargaining agreement. *McAlester*, on the other hand, involved an alleged discriminatory discharge but not a claimed violation of a labor agreement. As such, the *McAlester* holding is distinguishable from the case at bar, and there exists no conflict among the circuits.

In summary, we note that, contrary to petitioners' assertions, the decision below presents no question concerning the lower courts' application of law which merits this Court's review and is not in conflict with any decision of the other courts of appeals. Petitioners' argument is, quite simply, devoid of merit. The responsibility of the court below was merely to determine whether there exists any genuine issue of material fact, viewing the evidence in the light most favorable to the moving party, and whether the District Court correctly applied the law. *Ashton v. Cory*, 780 F.2d 816 (9th Cir. 1986). The Ninth Circuit made no error in its review warranting the granting of the application for writ of certiorari in this instance.

Instead, petitioners' request is based upon an erroneous view of the role of the Supreme Court in matters of review. Moreover, petitioners' assertions do not accurately describe the holding below. That determination whether or not correctly decided—and respondents believe it was—does not merit this Court's attention.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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